IN THE

United States Court of Appeals

For the Ninth Circuit

LEONARD WESLEY PARKER,	*Petitioner,*	Undocketed
vs.		
HONORABLE J. L. MCCARREY, JR., DISTRICT JUDGE OF THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, THIRD DIVISION,	*Respondent.*	

On Motion for Leave to File Petition for Writs of Prohibition and Mandamus and on Petition for Writs of Prohibition and Mandamus

AUDY W. DEERE,	*Appellant,*	16416 No. ~~16,146~~
vs.		
UNITED STATES OF AMERICA,	*Appellee.*	

On Appeal from the District Court for the District of Alaska, Fourth Division

KURTIS KAY KOSTERS,	*Appellant,*	Undocketed
vs.		
UNITED STATES OF AMERICA,	*Appellee.*	

On Appeal from the District Court for the District of Alaska, Fourth Division

BRIEF FOR THE ATTORNEY GENERAL OF THE STATE OF ALASKA AS AMICUS CURIAE

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JURISDICTION.

The State of Alaska hereby enters this matter as *amicus curiae* pursuant to Rule 18-9(c) and (d) of the

Rules of the United States Court of Appeals for the Ninth Circuit. The scope of this brief will be limited to aiding this court in the question of its jurisdiction over cases arising in the United States District Court for the Territory of Alaska. The question of the jurisdiction of the United States District Court for the Territory of Alaska will also be considered. The merits of the cases will not be considered.

SUMMARY OF ARGUMENT.

Congress under its authority to admit states into the Union has provided for the continuation of the operation and functioning of the court generally known as the District Court for the Territory of Alaska and also, supervision by appellate review and otherwise of this court by the Court of Appeals for the Ninth Circuit. The arrangement is necessary as a transitional measure involved in the passing of Alaska from territorial status to statehood. The arrangement has been consented to by the State of Alaska and is the only feasible and reasonable method by which to provide for the transitional period so as to prevent an interregnum or hiatus in the operation of the judiciary of not only the state government, but also of the United States.

Section 18 of the Statehood Act suspends the operation of §§ 12 through 17 and provides that the district court shall function as heretofore. Although this section clearly purports to suspend preceding sections of the Act, insofar as they pertain to the operation of

the lower court, the question of whether or not it deprives the Court of Appeals for the Ninth Circuit of jurisdiction is a matter of statutory construction. Any possible ambiguity which may result from the reading of § 18 of the Statehood Act out of context is resolved by considering § 1 of the same Act which ratifies the provisions of the Constitution of the State of Alaska, and therefore, the transitional measures in the Alaska Constitution which provide that the *"judicial system"* shall continue as on the date of admission. The court of appeals is an integral and necessary part of that *judicial system.*

It is unreasonable to assume that the Congress of the United States would have destroyed the jurisdiction of the court of appeals without express mention and detailed provision for the preservation of some other appellate review. Although this arrangement for appellate review may be unique historically, it is explained by the equally unique historical fact that Alaska as a Territory, and Alaska alone as a Territory, was deprived of any territorial judicial system and was therefore left at the date of statehood without any provision or system whatsoever.

Under the Constitution of the United States, Congress may make all necessary and proper laws for carrying into effect the express power to admit states into the Union. Although the courts existing in the Territory of Alaska were authorized under the provisions of the United States Constitution pertaining to the authority to provide for the government of territories, and were thus legislative courts, the courts

and the judicial system can continue under the equally potent constitutional authorization to admit states.

This judicial system, if it were imposed upon the State of Alaska without its consent, would clearly be an invasion of the right of the State of Alaska to be admitted into the Union on an equal footing with all other states. However, there can be no objection to this arrangement since it is with the full consent of the State, is a part of its organic law, and instead of being an imposition upon the State is, in fact, a beneficial arrangement in the best interest of the State and its people.

Although the jurisdiction of the lower court can be sustained as being either a legislative court of the United States, or, as a state court to which federal jurisdiction has been delegated, the State favors the first interpretation.

With full recognition of the right of the Court to review this arrangement, it is respectfully submitted that the same is largely political and in essence is the union of two sovereigns entering into a mutually desirable pact which contemplates at an early date the usual relationship in all respects which exists between the United States of America and the other states of the Union. This pact, which the people of Alaska consented to through their constitutional convention, their ratification of the Constitution by popular vote, their consent to the Enabling Act by popular vote, and their continued consent as expressed by their elected representatives in their State Legislature, should be most seriously considered and upheld if at all possible by this court.

ARGUMENT.

I.

THE ACT OF ADMISSION CONTINUES APPELLATE JURISDICTION AS HERETOFORE.

A. Section 18 of the Enabling Act suspends the operation of §§ 12 through 17 of the Act and provides that the district court shall function as heretofore.

Initially, it becomes necessary to determine the statutory basis for this court's appellate jurisdiction. Heretofore that statutory authority rested, without serious question, primarily upon §§ 1291, 1292 and 1294 of Title 28 of the United States Code, which provided for review of final and interlocutory decisions of the territorial courts by this court. Public Law 85-508, 72 Stat. 339 (hereinafter referred to as the Enabling Act) repealed these provisions by § 12(e) thereof.

However, § 18 of the Enabling Act provides that the provisions of the preceding sections relating to the "termination of jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of rights of litigants in suits before such courts shall not be effective" for up to three years. The section further states that during that period the territorial court "shall continue to function as heretofore." The State agrees with the Federal Government that the District Court for the Territory of Alaska continues to have jurisdiction over state and federal matters. However, the State does not agree that appellate jurisdiction of this court falls with respect to the District Court for the Territory of Alaska for lack of

statutory provision for its continuing appellate jurisdiction.

Heretofore the District Court for the District of Alaska has been subject to not only appellate review but has also been subject to a continuing supervisory control by the Court of Appeals for the Ninth Circuit. Section 41 of Title 28, U.S.C.A., places Alaska within the Ninth Judicial Circuit of the United States. The district court has been superintended by the Judicial Council of the Ninth Circuit established pursuant to the provisions of §§ 332 and 333 of Title 28, U.S.C.A. Under the last paragraph of 28 U.S.C.A., § 332:

> "Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

the Court of Appeals has not hesitated to intervene in the business of the courts below where necessity has so demanded. Thus in *Pennywell v. McCarrey,* 255 F.2d 735 (C.A. 9th, 1958), this court utilized the extraordinary writs in a case where the district court had issued a void bench warrant for an arrest to compel payment of a fine the petitioner had already paid. This court has always utilized its appellate jurisdiction to enforce the implementation of its mandates.

If the judicial system existing on January 3, 1959, has been stripped of all provisions for appeals and for continuing appellate supervision, the status quo

has not been continued. The district court will not function "as heretofore" and a radically new judicial system will have been created. The intent of § 18 is clear. The entire judicial system including the appellate jurisdiction of the Court of Appeals for the Ninth Circuit is to continue "as heretofore." No startling innovation with respect to appeals was intended.

B. Any possible ambiguity in § 18 of the Enabling Act regarding continuing appellate jurisdiction is resolved upon analysis of that section considered in the context of the Enabling Act.

1. Congress, by accepting, ratifying and confirming provisions of the Constitution for the State of Alaska concerning the continuance of "the judicial system," resolved any ambiguity in § 18 of the Enabling Act and showed an intent to continue appellate jurisdiction as heretofore.

There may be some ambiguity in § 18 of the Statehood Act when it is read out of context. Do the provisions for the "continuation of suits" and "succession of courts" refer to a continuance of the status quo with respect to both courts of original jurisdiction and appellate courts? Or do these provisions, as the Federal Government urges, refer only to a partial continuance of the status quo, that is, a continuance of the jurisdiction of the district court only? Examination of the remaining portions of the Enabling Act clearly reveals an intent on the part of Congress to continue the status quo with respect to all of the courts which have heretofore passed on Alaska cases.

Thus at the end of § 1 of the Enabling Act (P.L. 85-508, 72 Stat. 339), the following appears:

> ". . . the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Alaska . . . and adopted by a vote of the people of Alaska in the election held on April 24, 1956, is hereby found *to be republican in form and in conformity with the Constitution of the United States* and the principles of the Declaration of Independence, *and is hereby accepted, ratified and confirmed.*" (Emphasis added.)

What was accepted, ratified and confirmed by Congress with respect to a judicial system for Alaska? A review of Art. IV, § 1 and Art. XV, § 17 of the Constitution of the State of Alaska ratified by the Federal Government conclusively shows a federal and state intent to continue the status quo of the whole judicial system as constituted on January 3, 1959, for the transition period.

Article IV, § 1 of the Alaska Constitution as accepted by Congress provides in part:

> ". . . The courts shall constitute a unified judicial system for operation and administration. . . ."

The other sections of Art. IV make provision for a family of courts, a complete judicial system, including superior courts and a supreme court.

Article XV, § 17 of the Constitution of the State of Alaska provides:

> "Until the courts provided for in Article IV are organized, the courts, their jurisdiction, *and the judicial system shall remain as constituted on the date of admission* unless otherwise pro-

> vided by law. When the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law." (Emphasis added.)

The Enabling Act, by adopting the judicial system existing on the date of admission, adopted the entire judicial system including the court of original jurisdiction and the court of appeals. There is no evidence anywhere in the Enabling Act or elsewhere that Congress intended to accept only part of the Alaska constitutional plan for the continuance of the status quo with respect to the judicial system.

This is not the only instance in which Congress has given an existing Alaskan law the effect of a federal statute. In *Ketchikan Packing Company, et al. v. Fred A. Seaton, Secretary of the Interior, et al.,* decided by the United States Court of Appeals for the District of Columbia Circuit, Case No. 15075, filed May 14, 1959, the court sustained an interpretation of the Enabling Act by the Secretary of the Interior where Ordinance No. 3 abolishing fish traps, adopted by the people of Alaska along with the Constitution, was deemed to have been incorporated by Congress into the Enabling Act since that Act "accepted, ratified and confirmed" the Alaska Constitution. That opinion in pertinent part states:

"PER CURIAM: Appellants attack the validity of an order of the Secretary of the Interior dated March 7, 1959, 24 Fed. Reg. 2053-71, which has the effect of prohibiting the use of fish traps in Alaskan waters effective April 18, 1959. The order recites its authority as being Section 1 of the White Act, and before this court the Secretary argued that the White Act has been so amended by Section 6(e) of the Alaska Statehood Act as to compel him to order the prohibition. In promulgating the order, the Secretary says he merely complied with a statutory duty imposed by Congress.

"The so-called Westland proviso contained in Section 6(e) of the Statehood Act reads:

> '(T)he administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government *under existing laws* until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources *in the broad national interest*. . . .' (italics theirs)

On January 3, 1959, simultaneously with the effective date of the Statehood Act, the Constitution of the State of Alaska became effective and with it three ordinances adopted by the people of Alaska along with the Constitution. Ordinance No. 3 provides: . . . (My note: for prohibition of fish traps in all the coastal waters of the state)

> The Secretary read the words 'under existing laws' in the Westland proviso as including Ordinance No. 3 of Alaska, and concluded that the Statehood Act which 'accepted, ratified and confirmed' the Alaska Constitution, amended the White Act by prohibiting the use of such traps in Alaskan waters as set forth in the ordinance. In other words, the Secretary argues that the Congress did not intend that he should suspend the Alaskan ordinance, adopted by popular vote along with the Constitution, in the interim period while he administered the state's wildlife resources."
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> * * * * * * *
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> ". . . In such a situation, while the Secretary's interpretation of the powers conferred upon him by Congress is not binding on the courts nevertheless it is entitled to considerable weight. In this instance his interpretation is reasonable, and it is consistent with the congressional plan for interim administration of natural resources described in the Westland proviso. We think his view should be sustained.
>
> "Of necessity, in this unique interim situation, the Secretary must apply a federal sanction to effect the enforcement of a state law. . . ."

A copy of this opinion is attached as Appendix A.

The Federal Government states that it would be strange if Congress had intended that the jurisdiction of this court should be continued without specific mention of such continuing jurisdiction. The converse is true. It would have been remarkable if destruction

of the entire system of appellate review were contemplated without specific mention. Congress intended to continue the status quo for the transition period. Congress could have been expected to mention any radical changes or departure from the judicial system as it existed on the date of admission. Withdrawal of appellate jurisdiction and of appellate supervision as a part of that judicial system would have been such an extreme change in the existing judicial system as to demand specific and detailed mention. Provision for the continuance of the status quo on the other hand requires no detailed statement. As the Federal Government points out, "Congress was not oblivious of the distinction between the two classes of cases which would arise during the transitional period." It would have been just as extraordinary to remove appellate jurisdiction over cases of a state nature as over cases of a federal nature. If there were no continuation of the status quo, there would have been *no* courts in Alaska during the transition period. If no provision had been made for the continuation of the *whole* judicial system, there would be *no* appeals from and *no* appellate supervision over any transition courts of original jurisdiction carried over. Failure to provide for continuing appellate jurisdiction over cases of both a federal and a state nature would have been "such a novel and extraordinary departure from all precedent (as) would hardly have been signified by Congressional silence." Fortunately, Congress has expressed itself on this by adopting a whole judicial system as contemplated by the Constitution for the State of Alaska.

2. Under § 18 of the Enabling Act, litigants are entitled to a continuance of the status quo with respect to the satisfaction of their rights before the district court, this including the right to appeal and continuation of appellate supervision "as heretofore."

Conceding for the sake of argument that the language of § 18 of the Enabling Act regarding "the continuation of suits, the succession of courts," is ambiguous, the same cannot be said of the provisions for "the satisfaction of rights of litigants in suits before such courts." Would such litigants have the same continuing rights as litigants if they did not have the right to appeal certain interlocutory or final orders? For example, suppose the National Labor Relations Board should petition the District Court for the Territory of Alaska for injunctive relief under the provisions of § 160(e) of Title 29, U.S.C., for the enforcement of an order to prevent an unfair labor practice and that the district court hears that petition even though the Court of Appeals for the Ninth Circuit is not then in vacation. Section 160(e) of Title 29, U.S.C., provides that a United States District Court shall have power to issue such an order and to provide for temporary relief only when the Court of Appeals for the circuit is in vacation. Would the Court of Appeals in such case be powerless to prevent such usurpation of its authority? Would the rights of the litigant remain the same if he could not petition this court for a writ of prohibition? The answer is no.

3. If no statutory authority can be found for continuation of appellate jurisdiction over appeals in cases decided after statehood, then no present statutory authority can be found over appeals in cases decided before statehood.

The Federal Government states that there is no specific authority in § 18 of the Enabling Act for continuing appellate jurisdiction in this court and, therefore, this court has no authority to hear cases appealed from the District Court for the Territory of Alaska. This argument, when followed to its logical conclusion, leads to an absurdity. If authority cannot be found for continuing appellate jurisdiction over cases decided in the transition court, where can continuing appellate authority be found over cases decided in the District Court for the Territory of Alaska before January 3, 1959?

Congress must expressly provide for the disposition of territorial cases pending in the constitutional appellate courts of the United States on the date of statehood. *Freeborn v. Smith,* 2 Wall. 160 (1865), 17 L. ed. 922. The Attorney General of the United States has taken the position that the appellate jurisdiction of this court under 28 U.S.C., §§ 1291 and 1292, with the respect to the District Court for the Territory of Alaska is abrogated either by § 12(e) of the Enabling Act or by the very act of admitting Alaska as a State. Further, all parties herein, including the Attorney General of the United States, concur that §§ 13 through 17 are suspended by § 18.

The authority for exercising jurisdiction over these cases must rest either upon §§ 1291 and 1292 of Title 28, U.S.C., or upon § 14 of the Enabling Act, which

provides for the disposition of pending cases. The Government's argument inevitably leads to the conclusion that as far as the District Court for the Territory of Alaska is concerned, §§ 1291 and 1292 of Title 28, U.S.C., are either repealed or abrogated; that §§ 13 through 17 of the Enabling Act are suspended; that under the rule of *Freeborn v. Smith, supra,* cases pending at the time of admission in non-territorial courts cannot be heard without other statutory provision for their disposition; that no such authority may be found in § 18 of the Enabling Act; and, consequently, all cases pending on January 3, 1959, in this court or in the Supreme Court cannot, of necessity, be heard under the laws as they now exist.

This is subject to one qualification. Under the Government's analysis, this odd result would follow: Only when the District Court for the Territory of Alaska ceases to exist, will this court be authorized to hear appeals of cases decided by the District Court for the Territory of Alaska before January 3, 1959. At that time, according to the Government, §§ 13 and 14 of the Enabling Act will spring into effect and the court will then have specific statutory authority for hearing appeals from the old prestatehood territorial court.

Can an intent to kill or suspend all appeals on these cases be imputed to Congress? Congress has not been disposed to act so harshly in the past. Once before Congress failed to make provision for such cases, but upon discovering the error, immediately rectified it. See *Freeborn v. Smith, supra.* The Gov-

ernment's argument is inconsistent with § 13 of the Enabling Act, which shows the congressional intent at the outset by providing that no case pending in an appellate court shall abate.

This court has heard argument on more than one such case since the date of admission, and the Supreme Court has issued an opinion on at least one such case since January 3, 1959. See *Territory of Alaska v. American Can, et al.,* Docket No. 40, ... U.S. ..... (1959), recently remanded to this court.

At this point, it will or has occurred to the reader that perhaps some sections or portions of §§ 13 through 17 do not relate "to the termination of the jurisdiction of the District Court for the Territory of Alaska." A brief review of § 13 shows that it presupposes the creation and existence of state courts and of a United States District Court for the District of Alaska. Section 13 is clearly suspended in its operation. Section 14 makes provision for, among other things, remand of cases from this court to either (1) the State Supreme Court or other final appellate court of the State or (2) *the United States District Court for said district.* Section 14 is also suspended since this court will not be able to make such remands until the District Court for the Territory of Alaska ceases to exist. There can be no question that §§ 15, 16 and 17 are clearly prospective in operation.

The Federal Government's interpretation of § 18 is unreasonable and is totally inconsistent with the solicitude Congress has shown in providing Alaska with an orderly transition of courts.

4. Section 12 is technical "clean-up" legislation and is not intended to have any substantive effect on the succession of courts.

Section 12, in deleting the words "the District Court for the Territory of Alaska" in §§ 1291 and 1292 of Title 28, U.S.C., destroys the statutory provision upon which this court's appellate jurisdiction rests. However, §12 either (1) is suspended by § 18 or (2) is merely technical clean-up legislation.

It seems certain that Congress did not intend that §12 should have immediate effect. Section 460 of Title 28, U.S.C., makes the provisions of §§ 452-459 of Title 28, U.S.C., applicable to the District Court for the Territory of Alaska and certain other courts. Section 12(e) of the Enabling Act strikes the District Court for the Territory of Alaska from § 460 of Title 28. If § 12(e) of the Enabling Act is immediately effective, then that court and its judges are not subject to the provisions of §§ 452-460 of Title 28, U.S.C. Accordingly:

(1) That court is not necessarily always open, 28 U.S.C. § 452.

(2) Judges of that court need not take oaths, 28 U.S.C. § 453.

(3) Judges may practice law, 28 U.S.C. § 454.

(4) Judges need not disqualify themselves if biased, 28 U.S.C. § 455.

(5) Judges are not entitled to traveling expenses, 28 U.S.C. § 456.

(6) No provision is made for keeping of records, 28 U.S.C. § 457.

(7) Relatives of judges are eligible to appointment to an office or duty in such court, 28 U.S.C. § 458.

Many of the other amendments of the United States Code made by § 12 would create similar results if § 12 is immediately effective. For example, § 12(p) removes the words "and the District Court for the Territory of Alaska" from § 2201 of Title 28, U.S.C. It is this section which gives the District Court for the Territory of Alaska the power to issue declaratory judgments.

Section 12 makes sense if it is suspended in its entirety by § 18 for the same period of time that §§ 13 through 17 are delayed. If § 12 and, in particular, if § 12(e) becomes effective immediately, absurd results follow.

In House Report 624, 85th Congress, First Session, under Sectional Analysis, § 12 is described as merely making "a number of necessary technical amendments." It is §§ 13 through 17 which actually destroy the jurisdiction of this court over appeals from Alaska when the same become effective. Section 13 saves jurisdiction over pending appeals and limits the right of appellate review by this court to cases which arose prior to admission of Alaska and which are prosecuted in the newly-created Federal District Court. Section 12 is nothing more than the technical amending legislation which is to coincide with the actual implementation of the separation of courts into the constitutional dual system of state and federal courts. It is important to note the distinction between § 12 and §§ 13 through 17 because the latter sections spell out

the intent of Congress with care and precision. Sections 13 through 17 can stand without §12 (at least as to the pertinent question of the court's jurisdiction) and would give the exact duality of court systems found in every other state, which is the *ultimate* goal of Congress.

The intent of Congress was to suspend the operation of §§ 13 through 17 in their entirety by § 18. In so doing, the actual provisions which operate adversely upon this court's jurisdiction will not be effective for up to three years. In describing §§ 13 through 17, the House report, *supra,* states that the functions of such sections are to provide for a "continuation of suits, the succession of courts, the saving of rights of litigants in the courts." Note that this is exactly what § 18 suspends, to wit: continuation, succession and satisfaction of the rights of litigants. Since these sections constitute the actual destruction of this court's jurisdiction and since the intent of Congress is thus clearly to suspend their effectiveness, this court's jurisdiction continues until they become effective, notwithstanding the technical clean-up legislation contained in § 12.

C. It would be unjust to leave only the United States Supreme Court as the court of appeals since review by that Court is limited primarily to the discretionary issuance of a writ of certiorari.

Although there is no constitutional right to an appellate review,[1] immediate withdrawal of appellate

[1]See *Reetz v. Michigan,* 188 U.S. 505, 508, 47 L. ed. 563, 23 S. Ct. 390 (1903); *McKane v. Durston,* 153 U.S. 684, 14 S. Ct. 913, 38 L. ed. 867 (1894).

jurisdiction is so drastic an innovation in Alaska, with respect to both state and federal matters, that it is inconceivable Congress would effectuate such a result without making detailed provision for such a result.

There may well be a danger in denying a right of appeal to litigants in cases involving the "judicial power" vested by Art. III of the United States Constitution. Only in Alaska would litigants in cases of federal jurisdiction be deprived of a right of intermediate review. While Congress is not bound by the equal-protection clause of the Fourteenth Amendment, discrimination may be so arbitrary in such a situation mentioned above as to be a denial of due process guaranteed by the Fifth Amendment. For an example of a denial of due process pronounced by the Supreme Court in this very area, see *Griffin v. People of the State of Illinois,* 351 U.S. 12, 76 S. Ct. 585, 100 L. ed. 891 (1956). There the court held that where appellate review is afforded, any such review may not operate in a manner as to deprive those who are financially unable to pay the cost therefor of the privilege. Should this court hold that no appeal is permissible, then the citizens of Alaska would be denied that appeal afforded litigants in all other states. Such a discrimination, on a geographical basis, against parties who are litigants in Alaska courts would be as unjustifiable as the discrimination in the *Griffin* case.

To hold that Congress has deprived this court of appellate jurisdiction over all matters, including federal cases, coming from Alaska, attributes to Con-

gress an intent to make an unconscionable tear in the federal appellate framework. Only the Supreme Court of the United States could give remedy to erroneous decisions, and such relief would then be extended primarily only when a case involving a substantial question could draw the discretionary grant of certiorari.

II.

AS LONG AS THERE IS A FEDERAL DISTRICT COURT IN ALASKA, WHATEVER BE ITS TITLE, THE COURT OF APPEALS FOR THE NINTH CIRCUIT WILL HAVE JURISDICTION OVER IT UNDER SECTIONS 1291, 1292, AND 1294 OF TITLE 28, U.S.C.A., ABSENT STATUTORY AUTHORITY TO THE CONTRARY.

Even if statutory authority for continuing jurisdiction in the Ninth Court of Appeals cannot be found under § 18 of the Enabling Act there is specific statutory authority for that court to continue to hear appeals from the District Court for the Territory of Alaska. Assume that § 12 comes into operation immediately.

Section 1291 of 28 U.S.C.A. after amendment by § 12 would read:

> "*Final Decisions of the District Courts.* The courts of appeals shall have jurisdiction of appeals from all final decisions of the *district courts of the United States,* . . ."

The term "District Court for the Territory of Alaska" appearing in § 1291, Title 28 U.S.C.A. should be deemed to be synonymous with the "United States District Court for the District of Alaska" for the pur-

poses of that section in the absence of evidence of a contrary legislative intent.[2] Labels should not be determinative. *Juneau Spruce Corp. v. International Longshoremen's Union,* 12 Alaska 260, 265; 83 F. Supp. 224, 226 (1949) is perhaps the leading case on this. The issue there was whether the National Labor Relations Board could petition the "District Court for the District of Alaska" under the following statutory authorization:

> "The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business . . ."

The court stated:

> "Under the construction urged by the defendants the Board would be deprived of any forum in which to enforce its orders, so far as the Territory of Alaska is concerned, if the Court of Appeals for the 9th Circuit were in vacation. . . .

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[2]See *United States of America v. Frank Marrone; United States of America v. Truman Emberg,* consolidated, Criminal Nos. 4033 and 4031, Alaska, Third Division, opinion dated April 9, 1959. See also cases *contra* cited in said opinion: *Reese v. Fultz,* 13 Alaska 227, 96 F. Supp. 449 (1951); *United States v. Bell,* 14 Alaska 142, 108 F. Supp. 777 (1952); *International Longshoreman's and Warehouseman's Union v. Wirtz,* 170 F.2d 183 (1948).

"It would seem, therefore, that if such consequences are to be avoided the statute must be given such a construction as will be reasonable and consistent with its provisions. That it was not the intent of Congress to limit jurisdiction to the constitutional courts seems reasonably clear, and indeed authority for this view is not wanting. . . .

". . . It is undoubtedly the duty of the Court to ascertain the intent of Congress from the words used in the act, in the light of its aims, and to extend its operation to broader limits than its words appear to import if the Court is satisfied that their literal meaning would deny application of the act to cases which it was the intent of Congress to bring within its scope. . . .

"In view of the fact that this Court is vested with the jurisdiction of a district court of the United States and my conclusion that it was the legislative intent that the act should have a general and uniform application, I am constrained to hold that the term 'district court of the United States,' as used in the act, comprehends this Court. . . ."

This decision was sustained by the Court of Appeals for the Ninth Circuit in *International Longshoremen's Union v. Juneau Spruce Corp.,* 13 Alaska 291, 307; 189 F.2d 184 (1951) and further sustained on appeal to the United States Supreme Court in *International Longshoremen's Union v. Juneau Spruce Corp.,* 13 Alaska 536, 541; 342 U.S. 237, 240 (1952). In sustaining this decision Justice Douglas stated that it would be more consonant with the uniform, national policy of the Act to allow petitions in all United States

district courts including the Alaska court and observed:

> "... That reading of the Act does not, to be sure, take the words 'district court of the United States' in their historic, technical sense. But literalness is no sure touchstone of legislative purpose. The purpose here is more closely approximated, we believe, by giving the historic phrase a looser, more liberal meaning in the special context of this legislation."

It would seem odd that Congress would create a legislative federal district court to float in limbo without appeals therefrom or without appellate supervision. The logical policy for Congress to follow would be to place all species of federal district courts with a limited geographical jurisdiction subject to appellate review by and under the supervision of the Court of Appeals and the Judicial Conference for the circuit within which such court should be located. The presumption should be that this is the congressional intent since any other intent would be illogical.

This analysis is substantially the same as that expressed in *United States v. Marrone,* Cr. No. 4033, *United States v. Emberg,* Cr. No. 4031, consolidated, Alaska, Third Division, opinion dated April 9, 1959. The text of this opinion is set forth in full in appendix D.

III.

UNDER ARTICLE I, SECTION 8, CLAUSE 18, UNITED STATES CONSTITUTION, CONGRESS MAY MAKE ALL LAWS NECESSARY AND PROPER FOR CARRYING INTO EXECUTION THE EXPRESS POWERS OF THE FEDERAL GOVERNMENT; AND CONSEQUENTLY, PURSUANT TO THE POWER TO ADMIT STATES INTO THE UNION, CONGRESS MAY CONTINUE THE APPELLATE JURISDICTION OF CONSTITUTIONAL COURTS OVER CASES ARISING IN THE STATE WITH THE CONSENT OF THE STATE.

A. The United States Court of Appeals for the Ninth Circuit has jurisdiction to hear appeals from both constitutional and legislative courts, including the District Court for the Territory of Alaska.

The question now runs to the power of Congress to provide for review of the decisions of the Alaska courts subsequent to statehood in the United States Court of Appeals for the Ninth Circuit.

Citation is unnecessary to show that this court is a constitutional court and that the Alaska courts are legislative courts (unless they are state courts, the appellate review of which is reposed in this court, a suggestion which will be subsequently discussed).

Basically, this problem hinges upon the doctrine of separation of powers. Constitutional courts, with their independence given by Art. III, are vested with the judicial power of the United States. Early in our history it was found that Congress, pursuant to other powers, could create tribunals without the aid or restrictions of Art. III. This was revealed as to territorial courts in *American Insurance Co. v. Canter,* 1 Pet. 511, 7 L. ed. 242 (1828), where Chief Justice Marshall stated at page 546:

> "They are legislative courts, created . . . in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3rd article of the Constitution . . . although admiralty jurisdiction can be exercised in the states in those courts, only, which are established in pursuance of the 3rd article of the Constitution; the same limitation does not extend to the territories."

The import of the foregoing is that in a state only an Article III court can exercise the judicial power conferred by that article. The underlying theory is that under the separation of powers the judicial power of the United States is entrusted to courts which are independent of Congress by reason of tenure during good behavior and protection from reduction of compensation.

However, courts have come a long way from the *Canter* case, *supra.* Legislative courts and constitutional courts may be combined in the same court in the District of Columbia, *Keller v. Potomac Electric Power Co.,* 261 U.S. 428, 43 S. Ct. 445, 67 L. ed. 731 (1923). A legislative court may be created which exercises power previously exercised by an Article III court. The Court of Claims is such a court. *Ex parte Bakelite Corp.,* 279 U.S. 438, 49 S. Ct. 411, 73 L. ed. 789 (1929). Finally, it is seen that the "judicial power" vested in constitutional courts is not the limit of jurisdiction which Congress may give to those

courts. Judicial functions incidental to non-Article III legislative powers of Congress can be conferred on courts existing under Art. III[3] and conversely, under the rule of the *Bakelite* case, *supra,* Congress may remove some of the judicial power from the constitutional courts in implementing non-Article III powers of Congress. See *"Federal Legislative Courts,"* 43 *Harvard Law Review* 894 for the complexity involved in these distinctions and a history of the development of these concepts.[4]

The ability of Congress to provide for such appeals is, of course, based upon the power to admit new states and to do all things necessary and proper to accomplish that end. When a state is admitted, Congress may constitutionally continue appellate jurisdiction over legislative courts in cases pending in constitutional courts. *Express Co. v. Kountze Bros.,* 8 Wall. 342, 350, 19 L. ed. 457 (1869). With the coming of statehood the constitutional basis for such appellate jurisdiction shifts from the power of Congress

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[3]*National Mutual Ins. Co. v. Tidewater Transfer Co.,* 337 U.S. 582, 69 S. Ct. 1173, 93 L. ed. 1556 (1949); *O'Donoghue v. U.S.,* 289 U.S. 516, 53 S. Ct. 740, 77 L. ed. 1356 (1933); *Siegmund v. General Commodities Corp.,* 175 F. 2d 952 (CCA 9th 1949).

[4]A distinction should be drawn between problems where jurisdiction based upon both legislative and Article III sources is reposed in one court and instances where Congress attempts to impose legislative functions (as differentiated from judicial functions with legislative power as their source) upon an Article III court. This is readily seen in the *Keller* case, *supra,* where, although it was proper for District of Columbia courts to act both as a legislative and a constitutional court, and to that end perform the legislative function of rate setting, still, the Supreme Court of the United States could not review such a legislative function of those courts.

to enact all needful laws respecting a territory of the United States to its power to admit states into the Union.

B. Alaska can and has consented to continuing federal appellate jurisdiction.

Any objection that continuing federal appellate jurisdiction is an imposition upon the new State, depriving it of political rights so as to make the admission not on an equal footing, is answered by the fact that the State has consented to such jurisdiction, and, by its appearance here, continues to consent and is precluded from withdrawing that consent without an amendment to the Constitution of the State. That Constitution provides, in addition to Art. XV, § 17, *supra,* by Art. XII, § 13, that all the provisions of the Enabling Act are consented to by the State. In addition, the people of the State voted favorably upon the third proposition of § 8(b) of the Enabling Act, consenting to the provisions of that Act.

Judge Hodge, in *United States v. Egelak,* Cr. No. 1661 and *United States v. Blodgett,* Cr. No. 1668, Consolidated, Alaska, Second Judicial Division, opinion dated May 12, 1959, after setting forth portions of Chapter 50, *Session Laws of Alaska* 1959 regarding legislation to implement succession of courts observed:

> "Nothing could be more specific than the declaration of intent of the Legislature to accept the present courts and vest them with jurisdiction until the State courts are established. Therefore the contention of the defendants that Congress cannot create or establish a state court system for

> Alaska, and the contention of the amicus curiae that Congress has 'imposed' such system upon the State 'entirely within the discretion of the President of the United States', cannot be sustained."

The text of this opinion and of Chapter 50, *Session Laws of Alaska* 1959 are set forth in full in Appendix B.

See *Green v. Biddle,* 8 Wheat. 1, 89, 5 L. ed. 547 (1823) and 10 *Columbia Law Review* 591 for the proposition that whether or not a condition of statehood is properly imposed upon a new state, no complaint can be made if the condition is part of the organic law of the state. In effect, such a condition is not void but only voidable upon proper action by the state.

A distinction should be made between invalid conditions of an Enabling Act which deprive a state of equal footing and temporary beneficial measures to which the state extends a continuing consent. In this case Congress has exercised a power which is proper to the smooth admittance of the new State. This is not an exaction and withholding of political power as that condemned in *Coyle v. Oklahoma,* 221 U.S. 559, 31 S. Ct. 688, 55 L. ed. 853 (1911). There Congress imposed a condition forbidding the state to change the capital for a period of five years. The condition was never a part of the Oklahoma Constitution and hence was never the law of the state. Here we are dealing with a congressional provision which actually enables Congress to aid the State and which is in aid of the exercise of its power to admit new states.

IV.

THE COURTS BELOW CONTINUE THE SAME JURISDICTION UNINTERRUPTED BY STATEHOOD AS LEGISLATIVE COURTS VESTED WITH BOTH STATE AND FEDERAL JURISDICTION.

A. A legislative court can continue to function under power of Congress to admit new states.

It is, of course, paramount to the exercise of jurisdiction in this court that the courts below are proper repositories of the jurisdiction which Congress has continued under the Enabling Act for a temporary period. These courts may be considered as legislative courts with the same jurisdiction as before but with a different source of power being responsible for the grant of Congress of that jurisdiction. Instead of the basis of jurisdiction being the power to make all needful rules governing territories, the power now results from the authority to admit new states and to make all laws necessary to implement the admission in an orderly manner. To the extent that this is objected to as vesting the judicial power in a legislative court, see the *Bakelite* case, *supra,* where jurisdiction previously exercised at times by constitutional courts was properly vested in a legislative court. The court is respectfully referred to the opinion of Judge McCarrey in *United States of America v. Everett Starling,* Alaska, Third Division, No. 3973 Cr., decided February 21, 1959, in support of this analysis. In order not to duplicate Judge McCarrey's opinion, the argument of the State will be very briefly set forth. Congress has the implied power to implement its express powers. See *McCulloch v. Maryland,* 4 Wheat. 316 (1819). Precedent for the exercise of this type of

power is *Express Co. v. Kountze Bros.,* 8 Wall. 342, 19 L. ed. 457 (1869). In that case Congress, in exercising its powers to admit territories, provided for disposition of cases pending in the territorial courts. See also *Freeborn v. Smith, supra.*

B. Benner v. Porter can be distinguished.

Benner v. Porter, 50 U.S. 235, 13 L. ed. 119 (1849) is a leading case cited by petitioner who would find jurisdiction in this case wanting. Jurisdiction in a former Florida territorial court was found lacking after statehood with respect to an action in admiralty. The case can be distinguished as follows:

1. The state courts were in existence. Therefore, there was no emergency or need to use former territorial courts as state courts as an interim measure.
2. The United States District Court for the District of Florida was in existence and had jurisdiction to take federal cases.
3. The state of Florida did not consent to continuance of jurisdiction of former territorial court.
4. The Congress did not provide for continuance of jurisdiction over federal matters in the former territorial court. Congress made no attempt to use any of its implied powers in exercise of its express power to admit states.

V.

AS AN ALTERNATIVE, THE JURISDICTION OF THE COURT OVER STATE MATTERS MAY BE UPHELD UNDER THEORY THAT IT IS "BORROWED" BY STATE, AND JURISDICTION OVER FEDERAL MATTERS UNDER THE THEORY THAT FEDERAL JURISDICTION IS DELEGATED TO THE "STATE" COURT.

A. The State has "borrowed" the District Court for the Territory of Alaska for its purposes.

The intent of Congress and of the people of Alaska when they ratified the statehood act was evidently to maintain the status quo with respect to the existing legislative federal courts until the State and the Federal Government could create the usual system of state and federal courts. Accordingly, the theory which would appear most reasonable would be that these courts were to be continued as *legislative* courts for the interim period. If jurisdiction cannot be found under this theory, it may be found under the theory that they have jurisdiction over state matters as "state courts" whose court machinery is "borrowed" from the Federal Government. This may well be the result of the adoption of these courts by Art. XV, § 17, of the State Constitution, *supra.* If the power of these courts is founded therein, then they are state courts. As will later be explained, the Federal Government may constitutionally delegate jurisdiction to these "state" courts to try federal cases.

In *Ames et al. v. Colorado Cent R. Co.,* 1 Federal Cases 750, Case No. 324 (1876), the Federal Government made its former territorial courts available to the then new State of Colorado. The Constitution of Colorado provided:

". . . to the effect that all 'territorial officers should hold and exercise their respective offices and appointments until superseded under this constitution.' . . ."

The court observed:

"The territorial courts cease, on the admission of the state, to be courts of the territory, for the territorial government is displaced and abrogated; but, by adoption on the part of the state, with the consent of congress, these courts become the provisional and temporary courts of the state."

Evidently, at the time of statehood a federal court was created. The following is from page 752 of 1 Federal Cases:

". . . Pending cases which might have been brought in the federal courts established by the act, had such courts existed when the cases were commenced, are transferred to the proper federal court, which is declared to be the 'successor' of the territorial courts, a term which implies that these courts cease to exist as courts of the general government. All other cases remain and belong to the courts adopted or established by the constitution of the state. . . ."

B. Jurisdiction over federal cases may be vested by the Federal Government in the District Court for the Territory of Alaska.

The courts which have been designated in this discussion as "state" courts would be perfectly suitable forums for the continued exercise of federal jurisdiction. They act no differently than they did before the time of statehood. They are, in fact, territorial courts with federally-appointed and paid judges, car-

ried over for an interim period. In trial of federal cases—federal law, federal rules and federal procedure would apply in toto. The only difference between the *Colorado* case and the instant case is that in Alaska the former territorial court has not shed its federal functions under the Alaska Statehood Act and, therefore, except for titles and labels it is no different than the former territorial court. There is no reason why that court should not continue as a forum for federal cases during the transition period.

There is ample precedent for the delegation of federal jurisdiction to nonfederal courts. During the Federal Constitutional Convention, the propriety of the exercise of the federal judicial power by the state court was acknowledged by the express desire of one delegate that Congress should make use of the state tribunals. Mad. Jour. (ed. Scott) 379. In the debates on the Judiciary Act of 1789, it was even urged that no inferior federal tribunals should be established at all, 1 Ann. Cong. 783, 798-832 (1789). Collections of penalties under the Internal Revenue Law were laid in state courts at an early date. Act Mar. 3, 1791, 1 Stat. L., 199. In the past state courts have generally refused to exercise delegated congressional authority to enforce *penal* laws of Congress. *Teall v. Felton,* 1 N.Y. 537, 546. 49 Am.Dec. 352, 355 (1848) affirmed 12 How. 284, 13 L. ed. 990. This refusal was in part based upon the theory that one sovereign will not enforce the penal laws of another. However, this doctrine of sovereignty of the state as opposed to the central government has been objected to on the ground

that federal law is not only the supreme law of the land but applies in each state as much as state law does. *Ward v. Jenkins,* 10 Met. 583, 589. See also *Claflin v. Houseman,* 93 U.S. 130, 136, 23 L. ed. 883 (1876). The Supreme Court in *Testa v. Katt,* 330 U.S. 386, 67 S. Ct. 810, 91 L. ed. 967 (1947) has held that the Congress may use the state courts to enforce the Emergency Price Control Act, a federal statute. The State of Alaska would agree with the Federal Government that "it is also settled that whether civil, penal, or criminal in character, the laws of the United States are the laws of the several states in the sense that they may be entrusted to state courts for their enforcement." This principle should be particularly free from doubt where the state consents to enforce federal statutes in its courts.

Another theory which has been advanced to support the proposition that state courts with judges not appointed pursuant to Article III may maintain jurisdiction over the judicial power is that Congress does not delegate authority to exercise the jurisdiction but simply provides that the acts of the state court with relation to such subject matter are valid. *Beavins Partition,* 33 N.H. 89, 95 (1856). This, however, seems to beg the question. At any rate:

> "It is too late to question the constitutionality of the devolution of this authority upon the courts of the states, or their jurisdiction to exercise it. These issues have been settled by prescription and practice, and they are no longer open to question."
>
> *Levin v. U.S.,* 128 F. 826, 829 (1904).

See also

U.S. v. Jones, 109 U.S. 513, 520, 27 L. ed. 1015 (1883).

In summary, it seems that the state courts usually are held to have discretion as to whether they will or will not assume the jurisdiction in the absence of congressional mandate. Jurisdiction given under federal penal laws is usually refused, while civil jurisdiction is usually accepted. Congress can prohibit the exercise of the jurisdiction or it can enforce the acceptance of it. Certainly, it can no longer be questioned that, Congress willing, the state courts may exercise jurisdiction over cases arising under the federal judicial power. If the District Court for the Territory of Alaska is a state court, then it is bound not only by the Enabling Act but also by the State Constitution and, therefore, has the duty under both state and federal law to exercise jurisdiction over cases arising under the judicial power of the United States.

VI.

THE POWER OF THE UNITED STATES TO ADMIT NEW STATES SHOULD BE BROADLY CONSTRUED TO PERMIT REASONABLE AND NECESSARY TRANSITION MEASURES.

The United States Constitution makes no detailed provisions for the enlargement of the United States or the creation and addition of a new sovereignty, that is, of a state, nor is detailed provision made concerning the acquisition of new territories, the secession of states and territories, and other problems re-

lating to the basic sovereignty of the nation. Yet, the power to act as a sovereign, "a power which must belong to and somewhere reside in every civilized government." *(Andrews v. Andrews,* 188 U.S. 14, 33, 23 S. Ct. 237, 47 L. ed. 366 (1903)), has been found in every case where these fundamental political questions of sovereignty have been at issue and even when the power to cope with these problems has not been expressly spelled out in the Constitution. For example, courts and governments were created for newly created territories, the area comprised in the Louisiana Purchase was acquired, the Union continued to govern despite the secession of Confederate States, the remaining states created a new state—West Virginia—and eventually the Nation was rejoined. These problems were met, but the underlying reason justifying the results was never well described until *Missouri v. Holland,* 252 U.S. 416, 40 S. Ct. 382, 64 L. ed. 641 (1920), where Justice Holmes recognized that:

> "With regard to that we may add that when we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene

> any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved."

Substantial problems can be expected when the people of a state and nation choose to create a new sovereignty and when the elected representatives of a nation choose to enlarge their sovereignty by the creation and acceptance of a new state. Fortunately, the problems with respect to succession of courts during the transition of territories to states have never been severe because of several circumstances. Many of the states admitted had functioning territorial court systems with territorial supreme courts. The volume and complexity of litigation were never great enough in the past to prevent a quick and easy transfer of cases to United States district courts which were created and ready to function upon admission of the various states. Alaska as a territory was denied the privilege of its own separate court system and, in particular, of a territorial supreme court. Dockets of the District Court for the Territory of Alaska are crowded with mixed federal and nonfederal cases. Alaska of 1959 is totally unlike New Mexico of 1912 and the other states earlier admitted.

A narrowly legalistic construction of Article III would result in problems in the administration of justice unprecedented in American history. Every judicial action after January 3, 1959, would be void

and of no effect. There will be a few good citizens in Alaska who will find themselves bigamists under the law with invalid divorces. No court in Alaska will have the power to pass criminal sentence or to issue a writ of habeas corpus.

Many Alaskans have relied upon the validity of the acts of this court system since the date of admission. Convictions, judgments, arrests, indictments, divorces, attachments, marshal's sales since January 3, 1959, have been done and relied upon. Almost the entire exercise of government since that date would be void and of no effect if § 18 were to fall.

Further, the implementation of a state court system could not readily be accomplished in any short period. The administration of courts must be organized, rules adopted, the real and personal property necessary to a court must be obtained, and competent judges must be installed. Jails and prisons must be constructed, leased or otherwise acquired. As soon as a United States District Court for the District of Alaska begins to function, the Federal Government will have to instruct its marshals and deputy marshals, prosecutors, and jailers to discontinue their duties with respect to non-federal matters since under § 18 of the Alaska Enabling Act, these duties are to be assumed by the State of Alaska when the United States District Court for the District of Alaska is, according to a Proclamation of the President, ready to assume its functions.

It is in areas such as this that courts have found it impossible to reconcile a narrow interpretation of the

Constitution with the very concept of sovereignty inherent in our constitutional system. If it was ever appropriate to apply a liberal construction to an interpretation of the United States Constitution, it should be applied here. A broad construction should be placed upon the power of the United States to admit states. Reasonable latitude should be allowed for essential transition measures.

VII.

SINCE ADMITTANCE OF A STATE IS BASICALLY A POLITICAL MATTER, GREAT JUDICIAL RESTRAINT SHOULD BE EXERCISED IN OVERTURNING LEGISLATIVE MEASURES TO FACILITATE A REASONABLE TRANSITION.

The provisions of the act of admission, Public Law 85-508, 85th Congress, are carefully calculated to meet the needs of the new state. These provisions are the result of extensive congressional investigation.

> "A greater amount of information has been assembled regarding Alaska than in the case of any other territory which has been admitted to the Union. Effort has been made to study every facet of the effect statehood would have on both Alaska and the United States."
>
> House Report No. 624, June 25, 1957, 85th Congress, First Session, accompanying the act of admission.

It is obvious that Congress has bent every effort to investigate and facilitate the admission of Alaska.

Pursuant to Art. IV, § 3 of the Constitution of the United States, Congress is entrusted with the power to

admit new states into the Union. This power is only subject to the limitation contained in Art. III, § 4 of the Constitution, guaranteeing that every state shall have a republican form of government, and to the concept of equality of states. Congress has traditionally approved the constitution of each new state as being republican in form. This power is fundamental to the existence of the Union—nothing is more basic to the growth of the union of states. The enforcement of the constitutional guarantee of a republican form of government belongs to the political department. *Taylor v. Beckham,* 178 U.S. 548, 20 S. Ct. 890, 1009, 44 L. ed. 1187 (1900). Matters involving sovereignty and political rights are often held not to be within the province of the judicial branch of government. *Cherokee Nation v. Georgia,* 5 Pet. 1, 8 L. ed. 25 (1831). Congress, in the act admitting Alaska, found the Constitution of the State to be republican in form and by so doing sanctioned the judicial system for the transition period contemplated by the Alaska Constitution and the Enabling Act. This determination should not be lightly overturned.

Since the prospect of an immediate loss of present courts was not contemplated by either the Congress or the state government, the State of Alaska has proceeded under the assumption that the arrangement for interim courts set forth in the Enabling Act is valid. Indeed it has had little choice. It would have been a virtual impossibility to create overnight a judicial system, make provision for prosecution of criminal cases, empower prosecuting attorneys, assume the law

enforcement functions of the United States marshals, and establish and maintain an entire penal system. These problems are magnified by the necessity of spreading the judicial system, law enforcement agents, etc. over an area one-fifth the size of the United States.

Fortunately, the State of Alaska and the Federal Government, as a political matter, have not attempted to effect the whole transition in great haste. Alaska, since its admission to the Union on January 3, 1959, has directed its legislative efforts toward realization of the goal contemplated in the judiciary article of the State Constitution, the schedule of transitional measures therein respecting transfer of court jurisdiction, and § 18 of the Enabling Act. These efforts are evidenced by certain acts passed by the 1959 State Legislature which are designed to implement the State Constitution and the Enabling Act, both of which provide for the orderly development of the state judicial system and a systematic transfer of cases to the newly established courts.

Among these acts of the Alaska State Legislature is Chapter 50, SLA 1959 (see appendix), which provides, *inter alia,* for the promulgation of rules of civil and criminal proceedings within the courts of the State of Alaska; provides for their jurisdiction, the nomination, qualification and appointment of justices and judges; provides for periodical approval by the voters; provides for the filling of vacancies and removal of justices and judges; provides for the compensation of justices and judges; provides for the administration of the court system; and provides for an effective date.

It is noteworthy that Chapter 50 contains the following:

"Sec. 31. Commencement and Transfer of Causes.

. . . . . .

"(2) The jurisdiction of the courts of the State in this Act provided shall be exclusive from and after the 3rd day of January, 1962, but prior to that date shall be non-exclusive, and nothing in this Act shall diminish or deprive the District Court of the State of Alaska *or the Court of Appeals* or the Supreme Court of the United States of jurisdiction as provided by Public Law 508, 85th Congress, and other laws applicable thereto. (Emphasis added.)

"Sec. 32. Declaration of Intent and Method of Transition. It is the intent of the Legislature by the passage of this Act to provide for the organization of the State courts in an orderly manner so that the same will be completed on or before January 3, 1962 and so that during the intervening period advantage may be taken of the district and appellate structure referred to in Public Law 508, 85th Congress. . . .

. . . . . .

"(4) Notwithstanding the provisions of subsections (1), (2) and (3) of this section, in the event that either: a court of competent jurisdiction, by final judgment, declares that *the District Court of the State of Alaska* lacks jurisdiction to determine causes arising under the laws of the State, notwithstanding the provisions of Public Law 508, 85th Congress; or the President of the United States, by executive order, terminates the jurisdiction of the District Court of the State

> of Alaska, the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices or judges of all of the supreme and one or more or all superior courts of the State and in any event shall submit all of said names prior to January 3, 1962." (Emphasis added.)

At the time Chapter 50 was passed, the Legislature assumed, and understandably so, that the provisions of § 18 of the Enabling Act postponing the effective date of the "preceding sections" would continue the handling of appeals by the Court of Appeals for the Ninth Circuit as well as the District Court's jurisdiction over cases commenced in Alaska. Subsequently, however, the jurisdiction of the Court of Appeals was challenged, and accordingly, § 32(4) of Chapter 50, SLA 1959, was amended by Chapter 151, SLA 1959, to read as follows:

> "Notwithstanding the provisions of subsections (1), (2) and (3) of this section, in the event that either: a court of competent jurisdiction, by final judgment, declares that the *District Court of the District of Alaska* lacks jurisdiction to determine causes arising under the laws of the State, notwithstanding the provisions of Public Law 508, 85th Congress; or the President of the United States, by executive order, terminates the jurisdiction of the District Court of the District of Alaska; the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices or judges of all of the supreme and one or more or all superior courts of the State and in any event shall submit

all of said names prior to January 3, 1962. In the event that a court of competent jurisdiction, by final judgment, declares that the *United States Court of Appeals for the Ninth Circuit* lacks jurisdiction to hear appeals from the District Court of the District of Alaska, the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices of the supreme court and appeals from the District Court of the District of Alaska may be made to the State Supreme Court. If, upon the occurrence of any of the events set forth in this subsection, the members of the first Judicial Council have not been appointed, the Governor shall forthwith fill the initial vacancies." (Emphasis added.)

From the foregoing, the court will see that the Alaska State Legislature has construed § 18 of the Enabling Act so as to continue the functioning of the existing *judicial system* and not merely the functioning of the District Court for the Territory of Alaska. Both Chapter 50 SLA 1959, and the amendment thereto make such a conclusion inescapable. It is submitted that the contemporary construction of one of the parties to the act of admission is deserving of consideration.

Another Act evidencing the efforts Alaska has made and is making to provide for its judiciary is Chapter 48, SLA 1959. It provides, in pertinent part, as follows:

"Section 1. Authorization. The Legislative Council is hereby directed to conduct a study and prepare appropriate legislation designed to estab-

lish an overall judicial system for the State of Alaska. The study shall include a review of all facets of the Judicial branch of the State government, including a comprehensive judicial code, the physical facilities needed, and the initial capital outlay and annual operating costs anticipated. The study and accompanying legislation shall be completed and presented to this Legislature within 90 days from the day this Act becomes law."

The above-quoted Act was implemented by Chapter 49, SLA 1959, which made an appropriation to carry out the provisions thereof.

Consequently, Alaska has by deliberate progress, moved toward its court system as set out in the State Constitution. Alaska, unlike other territories when admitted, must begin from the foundation to erect a court system. The foregoing legislation indicates the meaning the State of Alaska has placed upon § 18 of the Enabling Act. Alaska has relied upon that Act and the continued jurisdiction of the United States Court of Appeals for the Ninth Circuit. This emphasizes the gravity of overthrowing the basically political arrangements arrived at to enable one sovereign, the State of Alaska, to enter and enlarge another sovereign, the United States of America.

CONCLUSION.

The Enabling Act, as seen in a reasonable light, portrays the intent of Congress to continue the appellate jurisdiction of this court over all cases and con-

troversies arising in Alaska. It is not unconstitutional to permit an Article III court to review decisions of either a legislative or state court. The courts in Alaska retain all prior jurisdiction even if they are legislative courts, since such courts may exercise the judicial power of the United States, and since the devolution of such jurisdiction upon them is necessary and proper to effectuate the power of Congress to admit new states. If, however, these courts are state courts, there is no question but that Congress may offer, and the State may accept, the jurisdiction of cases arising under the judicial power of the United States. In the latter case, the Federal Government may validly delegate federal jurisdiction to such state courts.

Dated, Juneau, Alaska,
May 21, 1959.

Respectfully submitted,

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Assistant Attorneys General

(Appendix Follows.)

Appendix.

Appendix A

United States Court of Appeals
for the District of Columbia

No. 15,075

Ketchikan Packing Company, et al.,
Appellants,

vs.

Fred A. Seaton, Secretary of the Interior, et al.,
Appellees.

Appeal from the United States District
Court for the District of Columbia

Filed May 14, 1959

Mr. Howard C. Westwood, with whom *Messrs. Stanley L. Temko, Robert L. Randall,* and *William H. Allen* were on the brief, for appellants.

Mr. Jerome A. Cohen, Assistant United States Attorney, with whom *Messrs. Oliver Gasch,* United States Attorney, and *Carl W. Belcher,* Assistant United States Attorney, were on the brief, for appellees. *Mr. John F. Doyle,* Assistant United States Attorney, also entered an appearance for appellees.

Before PRETTYMAN, *Chief Judge,* and FAHY and BURGER, *Circuit Judges.*

PER CURIAM: Appellants attack[1] the validity of an order of the Secretary of the Interior dated March 7, 1959, 24 Fed. Reg. 2053-71, which has the effect of prohibiting the use of fish traps in Alaskan waters effective April 18, 1959.[2] The order recites its authority as being Section 1 of the White Act,[3] and before this court the Secretary argued that the White Act has been so amended by Section 6(e) of the Alaska Statehood Act[4] as to compel him to order the prohibition. In promulgating the order, the Secretary says he merely complied with a statutory duty imposed by Congress.

---

[1]This is an appeal from the District Court's denial of declaratory judgment and preliminary injunction. We granted appellant's motion for a stay pending appeal and expedited the case. Appellants adequately represent three different interested classes: (1) salmon canning companies dependent to a substantial degree upon fish caught by traps in Alaskan waters; (2) individuals whose livelihoods have been dependent upon Alaskan trap fishing; and (3) companies and individuals who have ownership interests in Alaskan trap fishing locations.

[2]Except for certain fish traps enumerated in the order which are operated by Indian tribes or villages.

[3]43 Stat. 464 (1924), as amended by 44 Stat. 752 (1926), 48 U.S.C. Sec. 221: "For the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of the Interior from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, method, and extent of fishing as he may deem advisable." The White Act provides criminal sanctions for any violation of a regulation of the Secretary made pursuant to its authority. 43 Stat. 466 (1924), 48 U.S.C. Sec. 226.

[4]72 Stat. 339 (1958).

The so-called Westland proviso contained in Section 6(e) of the Statehood Act reads:

> "(T)he administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government *under existing laws* until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources *in the broad national interest. . . .*"[5] (Emphasis added.)

On January 3, 1959, simultaneously with the effective date of the Statehood Act, the Constitution of the State of Alaska became effective and with it three ordinances adopted by the people of Alaska along with the Constitution. Ordinance No. 3 provides:

> "As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and to make manifest the will of the people of Alaska, the use of fish traps for the taking of salmon for commercial purposes is hereby prohibited in all the coastal waters of the State." H.R. *Rep. No.* 624, 85th Cong., 2d Sess., app. A, 83 (1957).

The Secretary read the words "under existing laws" in the Westland proviso as including Ordinance No. 3

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[5]On April 27, 1959, the Secretary made the certification contemplated by the Westland proviso.

of Alaska, and concluded that the Statehood Act which "accepted, ratified and confirmed" the Alaska Constitution, amended the White Act by prohibiting the use of such traps in Alaskan waters as set forth in the ordinance. In other words, the Secretary argues that the Congress did not intend that he should suspend the Alaskan ordinance, adopted by popular vote along with the Constitution, in the interim period while he administered the state's wildlife resources.

One key consideration in the problem is that we are dealing with a transition measure—a temporary, not a permanent, provision. What was the intention of Congress concerning the interim transition period between federal territorial control and full statehood? In effect the Westland proviso makes the Secretary a "trustee" for both the federal government and the new state "in the broad national interest" during the transition of administration from the federal to the state authorities. The Secretary, in that unique capacity, could not reasonably disregard a valid law of Alaska which was "existing"[6] on January 3, 1959, the effective date of the Alaska Statehood Act which defined his powers over wildlife resources for the interim period commencing on that date.

We would ignore the obvious were we to fail to state that the question posed to us is close; no reading of the words of the statute, no part of the legislative

[6]See Jonesboro City v. Cairo & St. Louis R.R. Co., 110 U.S. 192, 198 (1883), "The phrase 'under existing laws,' in the section of the Constitution referred to, relates, we think, to the time of the adoption of the Constitution rather than to the time when the vote of the people was in fact taken."

history, no contemplation of a possible objective leads with absolute certainty to a clear answer. In such a situation, while the Secretary's interpretation of the powers conferred upon him by Congress is not binding on the courts[7] nevertheless it is entitled to considerable weight. In this instance his interpretation is reasonable, and it is consistent with the congressional plan for interim administration of natural resources described in the Westland proviso.[8] We think his view should be sustained.

Of necessity, in this unique interim situation, the Secretary must apply a federal sanction to effect the enforcement of a state law. See footnote 3 *supra*. This apparent anomaly can be explained only by reference to the fact that in this transition of authority the Secretary is operating in a dual capacity.

We have considered appellants' other contentions, including the argument that procedural errors occurred in the notice and hearings on the Secretary's action prohibiting fish traps, and we find no error which affects the validity of the Secretary's action.

The stay granted by this Court April 14, 1959, is therefore dissolved and the judgment of the District Court is

Affirmed.

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[7] *Cf.* Brannan v. Stark, 87 U.S.App.D.C. 388, 185 F.2d 871 (1950), *aff'd* 342 U.S. 451 (1952); Social Security Bd. v. Nierotko, 327 U.S. 358, 368-9 (1946).

[8] *Cf.* 104 *Cong. Rec.* 8738-39 (daily ed., May 28, 1958); *id.* at 8272-73 (daily ed., May 21, 1958); *id.* at 8490-91 (daily ed., May 26, 1958); *id.* at 10869-70 (daily ed., June 24, 1958).

Appendix B

In the District Court for the District of Alaska
Second Judicial Division

United States of America, Plaintiff, vs. Joseph Egelak, Defendant.	No. 1661, Cr.
United States of America, Plaintiff, vs. Robert R. Blodgett, Defendant.	No. 1668, Cr.

Russell R. Hermann, United States Attorney, Nome, Alaska, for plaintiff.

James A. von der Heydt, Nome, Alaska, for defendants.

Fred D. Crane and Warren Wm. Taylor, Fairbanks, Alaska, Amicus Curiae.

OPINION

On March 19, 1959, the defendant Joseph Egelak was indicted by the grand jury for the crime of manslaughter, in violation of Sec. 65-4-4 A.C.L.A. 1949. On March 23, 1959, the defendant Robert R. Blodgett was indicted for the crime of assault with a dangerous weapon, in violation of Sec. 65-4-22 A.C.L.A. 1949.

Both defendants have moved to dismiss the indictment upon the grounds: (1) that the District Court for the District of Alaska or the District Court for the Territory of Alaska is without jurisdiction to function in the State of Alaska; (2) that the indictment returned by the Grand Jury does not contain the endorsement of the names of the witnesses examined before the Grand Jury, as required by the provisions of Sections 66-8-52 and 66-11-1, Alaska Compiled Laws Annotated, 1949. On April 24, 1959, oral argument was had before the Court on the motion in the Eglak case, with the understanding that the issues involved would apply likewise in the Blodgett case.

Jurisdictional Question

At the time of hearing the defendants took the position that the decision of the Honorable J. L. McCarrey, Jr., in the case of *United States of America vs. Everett Starling,* Third Division, No. 3973, Cr., and associated cases, under date of Feb. 21, 1959 (..... F. Supp. .....), upholding the constitutionality of the transition measures provided by Sec. 18 of the Alaska Statehood Act (Public Law 85-508, 85th Congress), was dicta insofar as the jurisdiction of this court in cases involving violations of state statutes is concerned, for the reason that this case involved such jurisdiction in cases arising under Federal statutes. It also appeared at such time that no written opinion had been rendered by the District Judges of Alaska precisely touching upon jurisdiction in state cases, although similar motions or challenges to the juris-

diction of the court had been denied orally. *United States vs. Kosters,* Fourth Division; *United States vs. Deere,* Fourth Division. This Court was therefore requested to expressly pass upon the issues raised by such motion, although it appears that such issues were then and are now pending for determination by the Circuit Court of Appeals for the Ninth Circuit.

Subsequently, this court has received the opinion of Judge McCarrey in the case of *United States vs. Marrone,* Third Division, No. 4033, in which the issues raised by these motions are determined adversely to the contentions of the defendants. The position taken by defendants and amicus curiae is that the court is without jurisdiction for two reasons: first, the provisions of Sec. 18 of the Statehood Act are unconstitutional in that Congress may not impose upon the State of Alaska a judicial system, as each state must be admitted to the Union on an equal footing with all others; and, second, under the provisions of Sec. 12 of the Statehood Act the appellate jurisdiction of the Circuit Court of Appeals for the Ninth Circuit to hear appeals from this court was repealed, without provision for continuance of such right of appeal, and, therefore, that the defendant is left without any statutory right of appeal from the judgments of this court. Both of these issues were squarely presented in the Marrone case.

In this decision the Court directs attention to the provisions of Sec. 17, Art. XV, of the Constitution of the State of Alaska, and finds as follows:

> "In this section, the State of Alaska accepted the then established judicial system of the Territory of Alaska, including the appellate court, the United States Court of Appeals for the Ninth Circuit, for the transition period while the state court system was being established. Section 18 of Public Law 85-508, the Alaska Statehood Bill, was Congress's acceptance."

With respect to the second contention, the Court concludes:

> "I am of the opinion that there is a simple answer to this problem and that is that the United States Court of Appeals for the Ninth Circuit never lost its appellate jurisdiction over the present United States District Court in Alaska in either state or federal matters."

This decision, with which I fully concur, is stare decisis and determinative of such issues in this court. *State vs. Mellenberger,* 95 P. 2d 709, 128 A.L.R. 1506. However, I would add the following observations as additional compelling reasons for the holding that the State of Alaska has accepted the provisions of Sec. 18 of the Statehood Act.

The State Legislature has provided a system of Supreme and Superior Courts of the State of Alaska by Ch. 50, S.L.A. 1959, approved March 19, 1959. Secs. 31 and 32 of Art. III of this Act provide as follows:

> "Sec. 31. *Commencement and Transfer of Causes.* (1) the State courts shall be deemed organized for the purpose of transferring causes as provided in Section 17, Article XV of the Con-

stitution of the State of Alaska, on the 3rd day of January, 1962. Provided, however, that causes may be commenced, filed and determined in the State courts in each judicial district at the time of the appointment of one or more judges for such district.

(2) The jurisdiction of the courts of the State in this Act provided shall be exclusive from and after the 3rd day of January, 1962 but prior to that date shall be non-exclusive, and nothing in this Act shall diminish or deprive the District Court of the State of Alaska or the Court of Appeals or the Supreme Court of the United States of jurisdiction as provided by Public Law 508, 85th Congress, and other laws applicable thereto.

Sec. 32. *Declaration of Intent and Method of Transition.* It is the intent of the Legislature by the passage of this Act to provide for the organization of the State Courts in an orderly manner so that the same will be completed on or before January 3, 1962 and so that during the intervening period advantage may be taken of the district and appellate structure referred to in Public Law 508, 85th Congress. . . ."

Nothing could be more specific than the declaration of intent of the Legislature to accept the present courts and vest them with jurisdiction until the State courts are established. Therefore the contention of the defendants that Congress cannot create or establish a state court system for Alaska, and the contention of the amicus curiae that Congress has "imposed" such system upon the State "entirely within the discretion of the President of the United States", cannot be sus-

tained. In the same manner the contention of the defendants that Congress cannot create courts within a state other than in conformity with Article III, Sec. 1 of the Constitution of the United States is without merit, as such constitutional provision relates only to "the judicial power of the United States", relating solely to the Federal courts.

It should be further observed that the cases relied upon by defendants and amicus curiae of *Benner vs. Porter,* 50 U.S. 235, 13 L. Ed. 119, *American Insurance Co. vs. Canter,* 26 U.S. 511, 7 L. Ed. 242, and *Forsythe vs. U. S.,* 50 U.S. 571, 13 L. Ed. 262, have no real application to the issues in this case, as such relate to the continued jurisdiction of territorial courts in Federal cases, on admission of the Territory into the Union, as fully discussed by Judge McCarrey in the Sterling case.

With respect to the second contention, the Legislature has likewise made ample provision for appeals from this court during the interim period by an amendment to Sec. 32 (4), Article III, of the Judiciary Act (Ch. ..... S.L.A. 1959), providing that in the event that the Circuit Court of Appeals for the Ninth Circuit finds itself without jurisdiction to hear appeals from this court, the Supreme Court of the State of Alaska shall be immediately established, with jurisdiction over appeals from this court. Hence, it cannot be said that a defendant in this court would in any event be without right of appeal.

Endorsement of Names of Witnesses Upon Indictment

The sole question presented here is whether or not there is any actual conflict between the provisions of Sec. 66-8-52 A.C.L.A. 1949, requiring that when an indictment is found the names of witnesses examined before the grand jury must be inserted at the foot of the indictment or endorsed thereon, read in conjunction with Section 66-11-1 A.C.L.A. 1949, providing that the indictment must be set aside by the court when the names of the witnesses examined before the grand jury are not so inserted or endorsed thereon, and the provisions of Rule 7 (c) of the Federal Rules of Criminal Procedure proscribing the "nature and contents" of an indictment or information, making no reference to such endorsement; and the construction and application of the decision of the Circuit Court of Appeals for the Ninth Circuit upon this identical question in the case of *Soper vs. United States,* 220 F. 2d 158, 15 Alaska 475.

This question appears to be again pending upon an appeal to the Circuit Court in the case of *Short vs. United States,* the appellant's brief in which case is directed to the attention of the Court. Defendants direct attention to the mandatory provisions of the Alaska statutes and earnestly contend that there is no real conflict between such statutes and the Federal Rule; and that the decision in the Soper case is dicta and not binding on this court, and in conflict with a prior decision of the Circuit Court in the case of *Stephenson vs. United States,* 211 F.2d 702, 14 Alaska

603, wherein the court found no conflict between the Federal Rules and Sec. 58-5-1 A.C.L.A. with reference to cautionary instructions to juries.[1] Even though the decision of the Circuit Court in the Soper case might well be re-examined by that Court with respect to such actual conflict, such decision is binding upon this Court unless it can be considered dicta, or distinguished in point of law or fact. 21 *C.J.S.* 348, *Courts,* Sec. 198; *Forstmann vs. Rogers,* 35 F. Supp. 916; *New York Life Insurance Co. vs. Ross,* 30 F. 2d 80. This decision therefore bears careful analysis.

In this case a motion was made by defendant to dismiss the indictment upon the "stated grounds", among others, that the names of all of the witnesses who appeared before the grand jury were not endorsed thereon. The court in a footnote in the opinion held as follows:

> "Actually, the names of two witnesses were endorsed on the indictment. However, the names of witnesses are not required to be endorsed on any indictment in the District Court for the Territory of Alaska. Such indictments need only conform to the requirements of Rule 7 (c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. The indictment in this case did so conform. It should be noted and remembered that the Federal Rules

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[1]In appellant's brief in the Short case, it is also urged extensively that any contention that the entire Alaska Code of Criminal Procedure has been abrogated by the Federal Rules is flatly unsound. No such contention is made by the Government and it is conceded that only the laws of Alaska which are in conflict with such Rules would be so inoperative. 18 *U.S.C.A.* 3771 (formerly Sec. 687).

> of Criminal Procedure are now, and have been since October 20, 1949, applicable to all criminal proceedings in the District Court for the Territory of Alaska. See Rule 54 (a) (1) of said rules, as amended by the Supreme Court's order of December 28, 1948, 335 U.S. 953, 954, effective October 20, 1949. Sections 66-8-52 and 66-11-1, Alaska Compiled Laws Annotated, 1949, cited by appellants, became inoperative on October 20, 1949, and remain inoperative."

The grounds upon which it is urged that this decision is dicta are two: first, the statement by the court that the names of "two witnesses" were endorsed on the indictment; second, this decision appears in a footnote and is not actually a part of the decision in such case.

As to the first, it will be observed that the contention of the defendant was that the names of *all* witnesses were not so endorsed; therefore, the fact that the names of two witnesses were endorsed was not considered by the court as controlling, as the decision clearly indicates.

With regard to the second point, it has been established that a footnote is as much a part of the opinion as the matter contained in the body of the opinion, is as important as the remainder of the opinion, and has like binding force and effect. 21 *C.J.S. supra,* p. 407, Sec. 221; *Gray vs. Union Joint Stock Land Bank* (C.A. 6), 105 F. 2d 275; *Melancon vs. Walt Disney Productions* (Dist. Ct. App. Cal. 1954), 273 P. 2d 560.

Moreover, in the body of the opinion the Court further holds:

> "We further hold that the motion did not state any fact or facts warranting dismissal of the indictment, and that therefore the District Court would have been obliged to deny the motion, even if it had been made before trial—which it was not."

It is fundamental that a previous opinion deciding contentions identical in fact, law and application with those of the instant case should be followed on the principle of stare decisis unless and until reversed or overruled. 21 *C.J.S., supra,* 301, Sec. 186; *Words and Phrases,* Vol. 39-A, pp. 602-609; *Grand Rapids & I. R. Co. vs. Blanchard,* 38 F. 2d 470. It is true that the authority of a former decision as a precedent must be limited to the points actually decided. 21 *C.J.S. supra,* 380, Sec. 209. The decision in the Soper case clearly and actually decides the identical issues as presented in this case. A decision is dicta where the language is unnecessary to the decision or to the determination of the issues of the case, but where there is an adjudication of any point within the issues presented it is not dicta. 21 *C.J.S.* 309, *Courts,* Sec. 190; 14 *Am. Jur.* 295-7, *Courts,* Sec. 83; *Words and Phrases,* Vol. 12, pp. 557-563; *Valli vs. United States,* 94 F. 2d 687. The decision in the Soper case has since been followed in the District Court for the Territory (State) of Alaska, and must be held and considered to be stare decisis on the issues here presented, and binding upon this Court.

Defendants further contend that this ruling is inconsistent with instructions given by the Court to

the grand jury following the last portion of Sec. 66-8-52,[1] urging that there should be no distinction and that if the first portion of the statute is superseded so must be the last portion. There is merit in this contention, but the error lies instead in giving this instruction to the grand jury subsequently to the decision in the Soper case, which will be corrected. Such error is harmless so far as these defendants are concerned.

The Government further contends that the cited statutes are also in conflict with several other Federal Rules, but in view of the holding herein that the decision in the Soper case is controlling, this point need not be determined.

For the reasons assigned the motion to dismiss the indictments in both cases is denied. Appropriate orders may be presented accordingly.

Dated at Nome, Alaska, this 12th day of May, 1959.

/s/ Walter H. Hodge
District Judge

[1]This portion of the statute provides as follows:
". . . and if the indictment be for a misdemeanor only, and any witness has voluntarily appeared before the grand jury to complain of the defendant, his name must be marked as private prosecutor."

Appendix C

STATE OF ALASKA

CHAPTER 50

AN ACT

ıting to the supreme and superior courts of the State of Alaska; providing ›r the promulgation of rules of civil and criminal proceedings within the ›urts of the State of Alaska; providing for their jurisdiction, the nomination, ›ppointment, and qualification of justices and judges; providing for periodical ›pproval by the voters; providing for the filling of vacancies and removal of ıstices and judges; providing for the compensation of justices and judges; ›oviding for the administration of the court system; and providing for an fective date.

(C.S.S.B. 7)

t enacted by the Legislature of the State of Alaska:

Article I. Supreme Court

ection 1. **Jurisdiction.** The supreme rt has final appellate jurisdiction in actions and proceedings. The su- ne court may issue injunctions, s of review, mandamus, certiorari, ıibition, habeas corpus, and all other s necessary or proper to the complete rcise of its appellate and other juris- ion. Each of the justices may issue s of habeas corpus, upon petition by ›n behalf of any person held in al custody and may make such s returnable before the justice him- or before the supreme court, or re any judge of the superior court he State. Appeals to the supreme rt shall be a matter of right, except the State shall have no right of eal in criminal cases, except to test sufficiency of the indictment or rmation.

Sec. 2. **Court of Record: Composition: General Powers.** The supreme court is a court of record, consists of three justices including the chief justice, and is vested with all power and authority necessary to carry into complete execution all its judgments, decrees and determinations in all matters within its jurisdiction, according to the Constitution, the laws of the State, and the common law.

Sec. 3. **Sessions of Court.** The supreme court shall always be open for the transaction of business in the manner determined by rule of the court. The supreme court shall hold sessions on dates and at places fixed by court rule.

The administrative director of courts shall maintain his office at the same place in the State as the supreme court maintains its headquarters.

Sec. 4. **Effect of Adjournment.** Adjournments from day to day, or from time to time, are to be construed as

recesses in the session, and shall not prevent the court from sitting at any time.

Sec. 5. **Process.** Process of the supreme court shall be in the name of the "State of Alaska", be signed by the clerk of the court or his deputy, be dated when issued, sealed with the seal of the court, and made returnable according to rule prescribed by the court.

Sec. 6. **Seal of Court.** The seal of the supreme court shall be a vignette of the official flag of Alaska with the words "Seal of the Supreme Court of the State of Alaska", surrounding the vignette.

Sec. 7. **Qualifications of Justices.** A justice of the supreme court shall be a citizen of the United States and of the State, a resident of Alaska for three years immediately preceding his appointment, have been engaged for not less than eight years immediately preceding his appointment in the active practice of law, and at the time of appointment be licensed to practice law in Alaska. The active practice of law shall include:

(1) Sitting as a judge in a state or territorial court.

(2) Actually being engaged in advising and representing clients in matters of law.

(3) Rendering legal services to any agency, branch, or department of a civil government within the United States or any state or territory thereof, in an elective, appointive or employed capacity.

(4) Serving as a professor, associate professor, or assistant professor in a law school accredited by the Ame Bar Association.

Sec. 8. **Vacancies.**

(1) **Initial Vacancies.** The ernor shall initially fill the offic supreme court justices, including office of chief justice, within fort days after receiving nominations the Judicial Council, by appointin of two or more persons nominate the Council for each position.

(2) **Vacancies.** The Governor fill any vacancy in the offices o preme court justices, including the of chief justice, within forty-five after receiving nominations from Judicial Council, by appointing o two or more persons nominated b Council for each vacant position.

The office of a supreme court ju including the office of chief justic comes vacant ninety days after the tion at which he is rejected by a m ity of those voting on the questio for which he failed to file his dec tion of candidacy to succeed hi and his successor may be appointed ing this period, such appointme become effective upon the vacanc curring. A vacancy in said offices also occur by reason of the death tirement, resignation, forfeiture, o moval from office of any justice the event of any vacancy other tha initial vacancy, or immediately certification of rejection followin election, or immediately upon failu a justice to file declaration of candi the Judicial Council shall meet w thirty days after any of the said e occur and submit to the Governo

s of two or more persons nomi-
to fill each such vacancy.

e. 9. **Oath of Office.** Each supreme
justice, upon entering office, shall
and subscribe to an oath of office,
red of all officers under the Con-
ion and such further oaths or
nations as may be prescribed by

e. 10. **Approval or Rejection.**

(1) Each supreme court justice
be subject to approval or rejection
separate non-partisan statewide
at the first general election held
than three years after his appoint-
and if approved by a majority of
lectors voting on his candidacy, he
be retained in office. He shall
after be subject to approval or
ion in a like manner every tenth
If a majority of those voting on
andidacy reject his candidacy, he
not for a period of four years
after be appointed to fill any va-
in the supreme or superior courts
e State.

(2) Each justice seeking to succeed
lf to office shall file with the Sec-
y of State a declaration of such
dacy not less than ninety days be-
he date fixed for the general elec-
at which approval or rejection is
site. The Secretary of State shall
ptly certify such candidacy to the
on officials of the State, who shall
are, and have available at the polls,
arate statewide ballot upon which
shall be stated the proposition:
l .....
tained as justice of the supreme
for ten years?", with proper

provision for the marking of such propositions as "yes" and "no". The ballots shall be counted, returned, canvassed and certified in the manner provided by law for elective offices.

Sec. 11. **Incapacity.** Whenever the Judicial Council certifies to the Governor that a supreme court justice appears to be so incapacitated as substantially to prevent him from performing his judicial duties, the Governor shall appoint a board of three persons to inquire into the circumstances, and may on the board's recommendation retire the justice after hearing. Notice of the hearing shall be given to the justice in writing at least thirty days prior thereto.

Sec. 12. **Impeachment.** A supreme court justice is subject to impeachment by the Legislature for malfeasance or misfeasance in the performance of his official duties. Impeachment shall originate in the Senate and must be approved by a two-thirds vote of its members. The motion for impeachment shall list fully the basis for the proceeding. Trial on impeachment shall be conducted by the House of Representatives. A supreme court justice designated by the court shall preside at the trial. Concurrence of two-thirds of the members of the House is required for a judgment of impeachment. The judgment may not extend beyond removal from office, but shall not prevent proceedings in the courts on the same or related charges.

Sec. 13. **Restrictions.** A supreme court justice while holding office may not practice law, hold office in a political party, or hold any other office or position of profit under the United States,

the State or its political subdivisions. Any supreme court justice filing for another elective public office forfeits his judicial position.

Sec. 14. **Compensation.**

(1) The chief justice shall receive $23,500.00 annually, and each associate justice shall receive $22,500.00 annually as compensation, payable monthly in twelve equal installments. Compensation of the chief justice or of an associate justice shall not be diminished during his term of office, unless by general law applying to all salaried officers of the State.

(2) No salary warrant shall be issued to any justice of the supreme court until he has made and filed with the State officer designated to issue salary warrants an affidavit that no matter referred to the justice for opinion or decision has been uncompleted or undecided by him for a period of more than six months.

Sec. 15. **Administrative Director.** The chief justice of the supreme court shall, with the approval of the supreme court, appoint an administrative director to serve at the pleasure of the chief justice and to supervise the administrative operations of the judicial system.

Article II. Superior Court

Sec. 16. **Superior Court.** There shall be one superior court for the State. The court shall consist of four districts which shall be bounded as follows:

First District: the area within election districts numbered one to six, both inclusive, as said districts are described Article XIV of State Constitution the effective date this Act;

Second District: the area within el tion districts numb ed twenty-one t twenty-four, both clusive, as said tricts are described Article XIV of State Constitution the effective date this Act;

Third District: the area within el tion districts numb ed seven to fifte both inclusive, as s districts are descril in Article XIV of State Constitution the effective date this Act; and

Fourth District: the area within e tion districts numb ed sixteen to twer both inclusive, as s districts are descril in Article XIV of State Constitution the effective date this Act.

Sec. 17. **Jurisdiction and Venue.**

(1) (a) The superior court is trial court of general jurisdiction, w original jurisdiction in all civil criminal matters, specifically includi but not limited to probate and guardi ship of minors and incompetents.

ior court and its judges may issue
ctions, writs of review, mandamus,
tion, habeas corpus and all other
necessary or proper to the com-
exercise of its jurisdiction. A writ
beas corpus may be made return-
before any judge of the superior
The superior court has jurisdic-
n all matters appealed to it from
ordinate court, or administrative
y when such appeal is provided by
All such appeals shall be a matter
ght, except no appeal shall be
in any criminal case after a plea
ilty or by the State, except to test
ufficiency of an indictment or in-
tion. All hearings on appeal from
inal order or judgment of a sub-
ate court or administrative agency
be on the record unless the supe-
court, in its discretion, shall grant
l de novo, in whole or in part.

In case of an actual controversy
n the State, the superior court,
the filing of an appropriate plead-
may declare the rights and other
relations of any interested party
ng such declaration, whether or not
er relief is or could be sought. Any
declaration shall have the force and
of a final judgment or decree
hall be reviewable as such. Further
sary or proper relief based on a
ratory judgment or decree may be
ed, after reasonable notice and
ng, against any adverse party
e rights have been determined by
judgment.

2) The jurisdiction of the superior
shall extend over the whole of
State. All actions in ejectment or for the recovery of the possession of, quieting title to, for the partition of, or the enforcement of liens upon, real property shall be commenced in the judicial district in which the real property, or any part thereof affected by such action or actions, is situated.

(3) The court in which the action is pending may change the place of trial in any action from one place to another place in the same judicial district or to a designated place in another judicial district for any of the following reasons:

First: When there is reason to believe that an impartial trial cannot be had therein;

Second: When the convenience of witnesses and the ends of justice would be promoted by the change;

Third: When for any cause the judge is disqualified from acting; but in such event, if the judge of another judicial district is assigned to try the action, no change of place of trial need be made;

Fourth: If the court finds that the defendant will be put to unnecessary expense and inconvenience. Should the court find that said expense and inconvenience was intentonally caused, the court may assess costs against the plaintiff.

Sec. 18. **Courts of Record: General Powers: Sessions.** The superior court shall always be open, except on judicial holidays as determined by rule of the supreme court. Injunctions, writs of prohibition, mandamus and habeas corpus may be issued and served on holidays and non-judicial days. The superior court is a court of record and is vested

with all power and authority necessary to carry into complete execution all its judgments, decrees and determinations in all matters within its jurisdiction according to the Constitution, the laws of the State and the common law. The superior court shall hold regular sessions in each district at such times and at such place or places therein as may be designated by rule or order of the supreme court.

Sec. 19. **Effect of Adjournment.** Adjournments from day to day, or from time to time, are to be construed as recesses in the session, and shall not prevent the court from sitting at any time.

Sec. 20. **Seal of Court.** The seal of the superior court shall be a vignette of the official flag of Alaska with the words "Seal of the Superior Court of the State of Alaska", and a designation of the district thereof, surrounding the vignette.

Sec. 21. **Process.** Process of the superior court shall be in the name of the "State of Alaska", be signed by the clerk of the court or his deputy, in the judicial district where the process is issued, be dated when issued, sealed with the seal of the court, and made returnable according to rule prescribed by the supreme court.

Sec. 22. **Qualifications of Judges.** A judge of the superior court shall be a citizen of the United States and of the State, a resident of Alaska for three years immediately preceding his appointment, have been engaged for not less than five years immediately preceding his appointment in the active
tice of law, and at the time of app
ment be licensed to practice la
Alaska. The active practice of law
be as defined for supreme court jus

Sec. 23. **Vacancies.**

(1) **Initial Vacancies.** The
ernor shall initially fill the office
superior court judges within forty
days after receiving nominations
the Judicial Council by appointing
of two or more persons nominate
the Council for each position.

(2) **Vacancies.** The Governor
fill any vacancy in the offices of
rior court judges within forty-five
after receiving nominations from
Judicial Council by appointing or
two or more persons nominated by
Council for each vacant position.

The office of a superior court j
becomes vacant ninety days after
election at which he is rejected
majority of those voting on the
tion, or for which he failed to fil
declaration of candidacy to succeed
self, and his successor may be appoi
during this period, such appointme
become effective upon the vacancy
curring. A vacancy in said offices
also occur by reason of the d
retirement, resignation, forfeiture
removal from office of any judge.
the event of any vacancy other tha
initial vacancy, or immediately
certification of rejection following
election, or immediately upon failu
a judge to file declaration of candi
the Judicial Council shall meet w
the thirty days after any of the

s occur and submit to the Governor ames of two or more persons nomi- to fill each such vacancy.

. 24. **Oath of Office.** Each supe- court judge, upon entering office, take and subscribe to an oath of required of all officers under the itution and such further oaths or ations as may be prescribed by

. 25. **Number of Judges.**

) The superior court shall con- f eight judges, two of whom shall dges in the first judicial district, f whom shall be judge in the second ial district, three of whom shall be s in the third judicial district, and of whom shall be judges in the h judicial district. At the time of itting the names of any nominees e Governor to fill any vacancy on uperior court bench, the Judicial cil shall also designate the district ich the appointee is to first reside erve.

2) A presiding judge shall be nated for each district by the chief e of the supreme court. The pre- g judge shall in addition to his ar judicial duties: (a) assign the pending to the judges made avail- within the district, (b) supervise udges and their court personnel in arrying out of their official duties n the district, and (c) expedite and current the business of the court n the district.

3) The chief justice may assign a e and his court personnel for tem- y duty from time to time not to exceed ninety days annually anywhere in Alaska except to permit completion of hearings in progress, providing however, a judge may be so temporarily assigned for longer and additional periods with his consent.

Sec. 26. **Approval or Rejection.**

(1) Each superior court judge shall be subject to approval or rejection on a separate non-partisan ballot at the first general election held more than three years after his appointment, and if approved by a majority of the electors voting on his candidacy he shall be retained in office. He shall thereafter be subject to approval or rejection in a like manner every sixth year. If a majority of those voting on his candidacy reject his candidacy, he shall not for a period of four years thereafter be appointed to fill any vacancy in the supreme or superior courts of the State.

(2) Each judge seeking to succeed himself to office shall file with the Secretary of State a declaration of such candidacy not less than ninety days before the date fixed for the general election at which approval or rejection is requisite. The judge shall seek approval in the judicial district to which he was originally appointed, except in case of assignments and transfers with the judge's consent, in which case he shall seek approval in the district where he has served the major portion of his term, or where he last stood for election. The Secretary of State shall promptly certify such candidacy to the election officials of the State, who shall prepare, and have available at the polls, a separate judicial district-wide ballot upon

which there shall be stated the proposition: "Shall ..... be retained as judge of the superior court for six years?", with proper provision for the marking of such proposition as "yes" or "no". The ballots shall be counted, returned, canvassed and certified in the manner provided by law for elective officers.

Sec. 27. **Incapacity.** Whenever a judge of the superior court appears to be so incapacitated as substantially to prevent him from performing his judicial duties, the Judicial Council shall recommend to the supreme court that the judge be placed under early retirement. After notice and hearing, the supreme court by majority vote of its members may retire the judge. Notice of the hearing shall be given to the judge in writing at least thirty days prior thereto.

Sec. 28. **Impeachment.** A superior court judge is subject to impeachment by the Legislature for malfeasance or misfeasance in the performance of his official duties. Impeachment shall originate in the Senate and must be approved by two-thirds vote of its members. The motion for impeachment shall list fully the basis for the proceeding. Trial on impeachment shall be conducted by the House of Representatives. A supreme court justice designated by the court shall preside at the trial. Concurrence of two-thirds of the members of the House is required for a judgment of impeachment. The judgment may not extend beyond removal from office, but shall not prevent proceedings in the courts on the same or related charges.

Sec. 29. **Restrictions.** A superior co judge while holding office may not p tice law, hold office in a political pa or hold any other office or position profit under the United States, the S or its political subdivisions. Any su rior court judge filing for another e tive public office forfeits his judi position.

Sec. 30. **Compensation.**

(1) Each superior judge shall ceive $19,000.00 annually, as compe tion, payable monthly in twelve e installments. The compensation o judge shall not be diminished during term of office, unless by general applying to all salaried officers of State.

(2) No salary warrant shall b sued to any superior court judge u he has made and filed with the S officer designated to issue salary rants an affidavit that no matter ferred to the judge for opinion or cision has been uncompleted or u cided by him for a period of more six months.

Article III. Organization

Sec. 31. **Commencement and Tran of Causes.**

(1) The State courts shall be dee organized for the purpose of tran ring causes as provided in Section Article XV of the Constitution of State of Alaska, on the 3rd da January, 1962. Provided, however, causes may be commenced, filed determined in the State courts in judicial district at the time of the

intment of one or more judges for
ch district.

(2) The jurisdiction of the courts
the State in this Act provided shall
exclusive from and after the 3rd day
January, 1962 but prior to that date
all be non-exclusive, and nothing in
s Act shall diminish or deprive the
strict Court of the State of Alaska or
e Court of Appeals or the Supreme
urt of the United States of jurisdic-
n as provided by Public Law 508,
th Congress, and other laws appli-
ble thereto.

Sec. 32. **Declaration of Intent and ethod of Transition.** It is the intent the Legislature by the passage of s Act to provide for the organization the State courts in an orderly man-r so that the same will be completed or before January 3, 1962 and so that ring the intervening period advantage y be taken of the district and appel-e structure referred to in Public Law 8, 85th Congress. To effect this inten-n the State courts shall be organized the following manner:

(1) The Judicial Council shall, in operation with and through the facili-s of the Legislative Council, institute udies and make reports and recom-endations with regard to the facilities eded for the establishment of the su-eme and superior courts of the State. ch studies and reports shall include t not be limited to necessary court-om facilities and the location thereof; e number and nature of court at-ches and personnel and the esti-ated salary requirements of each posi-n; recommended rules governing prac-tice and procedure in civil and criminal cases; an estimated annual budget of the costs of operating the proposed supreme and superior court system and an estimate of the capital outlay required for physical facilities such as court-rooms, furnishings and libraries; and such additional information with regard to the administration of justice through the supreme and superior court system as may be required to fully inform the Legislature upon the subject.

(2) Upon the completion of the studies and reports provided in subdivision (1) hereof, copies shall be forthwith transmitted to the Governor and to the Legislature. Thereafter the Judicial Council shall meet and submit to the Governor the names of the persons nominated as the first justices of the supreme court, but in no event earlier than 30 days after submission of said reports and studies to the Legislature, and if the Legislature is not in session then not earlier than 30 days after the Legislature convenes.

(3) Upon the appointment of the first supreme court justices, the supreme court shall, as soon as may be practical, consider the reports and studies of the Judicial Council and thereafter make and promulgate such rules governing the administration of courts and the practice and procedure in civil and criminal cases as the court may deem appropriate. When the court has adopted such rules governing causes and procedure of the supreme and superior courts, the chief justice shall so advise the Judicial Council and within thirty (30) days thereafter the Judicial Council

shall meet and submit to the Governor the names of the persons nominated for some or all of the superior court judges. The Judicial Council may submit the names of all persons nominated as superior court judges for all districts at this time or may submit the names of persons nominated in less than all of the judicial districts or less than all judges provided for in a district in such manner as will provide a gradual series of appointments consistent with the availability of physical facilities and court personnel.

(4) Notwithstanding the provisions of subsections (1), (2) and (3) of this section, in the event that either: a court of competent jurisdiction, by final judgment, declares that the District Court of the State of Alaska lacks jurisdiction to determine causes arising under the laws of the State, notwithstanding the provisions of Public Law 508, 85th Congress; or the President of the Unit States, by executive order, terminat the jurisdiction of the District Court the State of Alaska, the Judicial Cou cil shall forthwith meet and submit the Governor the names of the perso nominated as justices or judges of all the supreme and one or more or superior courts of the State and in a event shall submit all of said nam prior to January 3, 1962.

Sec. 33. **Severability.** The fact th any section, subsection, sentence, clau or phrase of this Act is declared inval for any reason shall not affect the r maining portion of this Act.

Sec. 34. **Effective Date.** This A shall take effect upon its passage a approval or upon becoming law witho such approval.

Approved March 19, 19

Appendix D

In the District Court for the District of Alaska
Third Division

United States of America, Plaintiff, vs. Frank Marrone, Defendant.	Criminal No. 4033
United States of America, Plaintiff, vs. Truman Emberg, Defendant.	Consolidated Criminal No. 4031

OPINION

George N. Hayes, Assistant United States Attorney, Anchorage, Alaska, for the plaintiff.

Wendell P. Kay, Anchorage, Alaska, for defendant Marrone.

Seaborn J. Buckalew, Jr., Anchorage, Alaska, for defendant Emberg.

By order of the Court, these two cases have been consolidated for argument.

The defendants filed a motion for continuance ". . . upon the ground that this Court has no jurisdiction to try the offense with which he is charged,

this court being a Territorial court abolished by the admission of Alaska to Statehood." The question to be determined by the Court is whether the defendants should be granted a continuance until the question of the jurisdiction of the District Court for the Territory of Alaska over state matters is determined by an appellate tribunal.

Both the defendants were indicted for crimes against the Territory of Alaska by the grand jury on November 7, 1958, prior to Alaska's admission into the Union. Their trials before the District Court for the Territory of Alaska were set for April 15 and April 13, 1959, respectively.

The defendants base their argument in support of their motions to continue upon their interpretation of Section 17, Article XV, of the Alaska Constitution, which reads as follows:

> "Section 17. *Transfer of court jurisdiction.* Until the courts provided for in Article IV are organized, the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admission unless otherwise provided by law. When the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law."

In this section, the State of Alaska accepted the then established judicial system of the Territory of

Alaska, including the appellate court, the United States Court of Appeals for the Ninth Circuit, for the transitional period while the state court system was being established. Section 18 of Public Law 85-508, the Alaska Statehood Bill, was Congress's acceptance. This section continues the District Court for the Territory of Alaska and the Commissioners Courts for an interim period, but note that it does not specifically continue the appellate jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Counsel for the defendants further state that Sections 1291, 1292 and 1294 of Title 28 U.S.C.A. no longer confer appellate jurisdiction on the United States Court of Appeals for the Ninth Circuit from matters originating in the Alaska territorial courts as was the system before statehood, for the reason that the District Court for the Territory of Alaska is not a "District Court of the United States," and all references to the District Court for the Territory of Alaska contained in the above sections of Title 28, U.S.C.A., were stricken on the admission of Alaska into the Union by the Terms of Section 12 of the Alaska Statehood Bill, supra. Therefore, they conclude that Alaska's court system does not remain as constituted on the date of Alaska's admission to the Union, and thus Alaska was not granted what it bargained for in the way of a court system as provided in Section 17, Article XV, of its Constitution. The defendants claim that this lack of an appellate tribunal violates the Privileges and Immunities clause of the United States Constitution, Article 4, Section 2, because the citizens

of all the other states in the Union enjoy the right of appeal in all state and federal matters. It is interesting to note that the United States Department of Justice takes a similar position in two Fairbanks cases. See Deere vs. U. S. and Kosters vs. U. S.

I am of the opinion that there is a simple answer to this problem and that is that the United States Court of Appeals for the Ninth Circuit never lost its appellate jurisdiction over the present United States District Court in Alaska in either state or federal matters. Certainly Congress did not intend to leave Alaska without an appellate tribunal. No the thought makes reason stare. Thus, I find that Section 12 of the Alaska Statehood Bill, supra, does not go into effect until the President, by proclamation, terminates the present federal courts in Alaska. See *United States vs. Starling,* Criminal No. 3973, Alaska, Third Division, opinion dated February 21, 1959, at pages 17 and 18.

I am of the opinion that even if Section 12 of the Alaska Statehood Bill, supra, was effective immediately upon the admission of Alaska into the Union, Sections 1291, 1292, and 1294 of Title 28, U.S.C.A., still provided for appeals from the present Alaska courts to the United States Court of Appeals for the Ninth Circuit.

The defendants contend that the removal by Section 12 of the Statehood Act of the references to appeal, to the United States Court of Appeals for the Ninth Circuit, of causes arising in the United States District Court for the Territory of Alaska, from Sections

1291, 1292, and 1294, supra, precludes appeals from this court because it is not a "District Court of the United States." While not referred to at the hearing, I have never been moved or impressed with the theory relating to the jurisdiction of the territorial courts based on the "Magic Words" doctrine. They have ". . . become as sounding brass, or a tinkling cymbal."

Judge Dimond, a distinguished jurist of this court, relied on this doctrine in at least two cases to reach a decision. See *Reese vs. Fultz,* 13 Alaska 227, 96 F. Supp. 449 (1951), and *United States vs. Bell,* 14 Alaska 142, 108 F. Supp. 777 (1952). Judge Denman of the United States Court of Appeals for the Ninth Circuit also relied on this doctrine in his holding that the Norris-LaGuardia Act did not apply in the Hawaiian Federal Courts. In that case there was also strong legislative history to support his conclusion. See *International Longshoreman's and Warehouseman's Union vs. Wirtz,* 170 F. 2d 183 (1948). The difference between the approach of Judge Dimond and this Court is that this Court presumes a federal statute referring to "District Courts of the United States" to include the District Court for the Territory of Alaska until it is shown by the preponderance of the evidence that this was not the intent of Congress. Judge Folta used this approach in regard to the "magic words," "District Court of the United States," found in Section 303 (b) of the Taft Hartley Act. See *Juneau Spruce Corp. vs. International Longshoremen's Union,* 12 Alaska 260, 265; 83 F. Supp. 224, 226 (1949):

"The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business . . .

"Under the construction urged by the defendants the Board would be deprived of any forum in which to enforce its orders, so far as the Territory of Alaska is concerned, if the Court of Appeals for the 9th Circuit were in vacation. And a similar result would follow if the Board should proceed under Section 10(j). But that is not all. Provision is made in Section 11(2) for the enforcement of the process of 'any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia.' But in Section 302(e), empowering the district courts of the United States and the United States courts of the territories and possessions to enjoin violations of the act, the District of Columbia is omitted, so that, literally construed, violations of the act may be enjoined everywhere, including the possessions, where it is clear under Section 2(6) that the act has no application whatever, except in the District of Columbia. It is thus apparent that, if defendants' view of the law is correct, the courts are empowered under Sections 11(2) and 302(e) to enforce

their orders by subpoena and injunction in the possessions, where the substantive provisions of the act have no application, but not by injunction in the District of Columbia where obviously such provisions are in force and effect.

"It would seem, therefore, that if such consequences are to be avoided the statute must be given such a construction as will be reasonable and consistent with its provisions. That it was not the intent of Congress to limit jurisdiction to the constitutional courts seems reasonably clear, and indeed authority for this view is not wanting. Thus in United States v. Brotherhood of Locomotive Engineers, D.C., 79 F. Supp. 485, and United States v. International Union, United Mine Workers, D.C., 77 F. Supp. 563, injunctions were issued by Judge Goldsborough of the District Court of the United States for the District of Columbia under a provision of Section 208(a) granting such power to 'any district court of the United States.' Manifestly, if defendants' view is correct, that Court was without power to act in these cases. But the decision which in my opinion is decisive of this controversy is Federal Trade Commission vs. Klesner, 274 U.S. 145, 47 S. Ct. 557, 71 L. Ed. 972, in which the term 'circuit court of appeals of the United States' in the Federal Trade Commission Act, 15 U.S.C.A. Sec. 41 et seq., was held, in an almost identical factual situation, to comprehend the Court of Appeals for the District of Columbia.

"Other considerations lend support to the construction urged by the plaintiff, not the least of which is that the very lack of uniformity and consistency in the use of the term 'district court of the United States' throughout the act itself

shows not only the futility of construing the term in a literal or restricted sense, but also that such could not have been the Congressional intent. It is undoubtedly the duty of the Court to ascertain the intent of Congress from the words used in the act, in the light of its aims, and to extend its operation to broader limits than its words appear to import if the Court is satisfied that their literal meaning would deny application of the act to cases which it was the intent of Congress to bring within its scope. The statute is remedial. It should be so construed as to prevent the mischief and advance the remedy.

"In view of the fact that this Court is vested with the jurisdiction of a district court of the United States and my conclusion that it was the legislative intent that the act should have a general and uniform application, I am constrained to hold that the term 'district court of the United States,' as used in the act, comprehends this Court. Accordingly, the demurrer should be overruled."

The presumption derived from the wording of the Taft Hartley Act is almost identical with that in Section 12 of the Alaska Statehood Bill, supra. Why should the Alaska Statehood Act be interpreted differently?

The United States Court of Appeals for the Ninth Circuit, speaking through Judge Bone, treated the "magic words" argument in the Juneau Spruce case, supra, in the same fashion as Judge Folta. See *International Longshoremen's Union vs. Juneau Spruce Corp.*, 13 Alaska 291, 307; 189 F. 2d 177, 184 (1951), where Judge Bone held as follows:

"Regardless, however, of the status of Alaska 'local law' we cannot bring ourselves to believe that Congress framed the provisions of the Act so as to create a right of action under Section 303 but deliberately denied application of the important provisions of Section 301 in the event a cause of action was asserted in the Alaska court. The complexities (and the lack of any general rule of application) of 'local law' and common law principles in relation to suits against unincorporated associations such as labor unions presented one of the serious problems receiving attention and consideration at the hands of Congress, as is clearly indicated in committee reports. See Senate Report No. 105 (by Senator Taft) Legislative History of the Labor-Management Relations Act, Vol. 1, pp 421, 422, 423. This contemplation of the law carries the conviction that Congress clearly intended the provisions of Section 301 to be applied by the 'district court for the Territory of Alaska' in actions based upon the provisions of the Act.

"It is certain that Congress adopted the Act with full knowledge that the only court in the entire Territory of Alaska which could possibly entertain and adjudicate a cause of action arising under the Act was the lower court—a federal court created by Congress and vested with the jurisdiction of district courts of the United States. It is noteworthy that in referring to the right to sue a labor organization 'as an entity', and to serve an 'officer or agent of a labor organization,' Section 301, subdivisions (b) and (d) provide for such procedure in a 'court of the United States'. Even if this court were not 'a district

court of the United States', it is unquestionably, and under any test, a 'court of the United States.'

"No plausible or acceptable reason has been suggested to us as a basis for the conclusion that Congress intended to create the strange geographical hiatus in the law that acceptance of appellants' construction of the Act would produce. To adopt such a conclusion would require a construction of its terms so strict and narrow as to evince disregard of the dominating reasons assigned by Congress for its enactment. In short, it would mean that, for most purposes, the law was a dead letter in Alaska. Upon at least two occasions the Supreme Court refused to construe the literal language of statutes in a manner which would disregard and thereby frustrate the obvious purpose and policy of the legislation involved and produce unreasonable or absurd results. We adopt the rationale of the rule applied in these cases.

"The spirit, tenor and purport of the Act also convince us that Congress intended to bring *all* aspects of labor-management relations in Alaska which affect commerce within the ambit of the Act. We are persuaded that the lower court had jurisdiction to entertain and adjudicate the instant cause and to apply the provisions of Section 301. We further hold that Congress intended the language of Section 303 (which refers to district courts of the United States) to embrace and include 'the district court for the Territory of Alaska.' And in this connection we are generally in accord with the opinion expressed by the trial court on the subject of the jurisdiction of that court as related to the issues in this case."

It is noteworthy that Judge Bone thought that the District Court for the Territory of Alaska was even a "Court of the United States."

When the Juneau Spruce case, supra, was appealed to the Supreme Court of the United States, Justice Douglas treated the "magic words" argument in the following manner:

> "*First.* This suit was brought in the District Court for the Territory of Alaska. And the question which lies at the threshold of the case is whether that court is a 'district court of the United States' within the meaning of Sec. 303(b) of the Act. That court has the jurisdiction of district courts of the United States by the law which created it. 48 U.S.C. Sec. 101, 48 U.S.C.A. Sec. 101. Yet vesting it with that jurisdiction does not necessarily make it a district court for all the varied functions of the Judicial Code. See Reynolds v. United States, 98 U.S. 145, 154, 25 L. Ed. 244; McAllister v. United States, 141 U.S. 174, 11 S. Ct. 949, 35 L. Ed. 693; United States v. Burroughs, 289 U.S. 159, 163, 53 S. Ct. 574, 576, 77 L. Ed. 1096; Mookini v. United States, 303 U.S. 201, 205, 58 S. Ct. 543, 545, 82 L. Ed. 748. The words 'district court of the United States' commonly describe constitutional courts created under Article III of the Constitution, not the legislative courts which have long been the courts of the Territories. See Mookini v. United States, supra, 303 U.S. at page 205, 58 S. Ct. 545. But we think in the context of this legislation they are used to describe courts which exercise the jurisdiction of district courts. The jurisdiction conferred by Sec. 303 (b) is made 'subject to the limitations governing district courts as respects

the amount in controversy and the citizenship of the parties'; it defines the capacity of labor unions to sue or be sued; it restricts the enforceability of a money judgment against a labor union to its assets; and it specifies the jurisdiction of a district court over a union and defines the service of process. Congress was here concerned with reshaping labor-management legal relations, and it was taking steps to declared and announced objectives. One of those was the elimination of obstacles to suits in the federal courts. It revised the jurisdictional requirements for suits in the district courts, requirements as applicable to the trial court as to any court which in the technical sense is a district court of the United States. The Act extends in its full sweep to Alaska as well as to the states and the other territories. The trial court is indeed the only court in Alaska to which recourse could be had. Even if it were not a 'district court' within the meaning of Sec. 303 (b) it plainly would be 'any other court' for purposes of that section. As such other court it might or might not have jurisdiction over this dispute depending on aspects of territorial law which we have not examined. But since Congress lifted the restrictive requirements which might preclude suit in courts having the district courts' jurisdiction, we think it is more consonant with the uniform, national policy of the Act to hold that those restrictions were lifted as respects all courts upon which the jurisdiction of a district court has been conferred. That reading of the Act does not, to be sure, take the words 'district court of the United States' in their historic, technical sense. But literalness is no sure touchstone of legislative purpose. The purpose here is more

closely approximated, we believe, by giving the historic phrase a looser, more liberal meaning in the special context of this legislation."

See *International Longshoremen's Union vs. Juneau Spruce Corp.* 13 Alaska 536, 541; 342 U.S. 237, 240 (1952).

Under the reasoning of the courts in the Juneau Spruce case, supra, and this Court's prior expressed beliefs on the subject of "District Court of the United States," (*U. S. vs. King,* 14 Alaska 500; 119 F. Supp. 398 (1954)), I am of the opinion that the United States Court of Appeals for the Ninth Circuit has appellate jurisdiction over the United States District Court for the Territory of Alaska under the pertinent portions of Sections 1291, 1292, and 1294 of Title 28, U. S. C. A., which read as follows:

"Sec. 1291 Tit. 28 USCA FINAL DECISIONS OF THE DISTRICT COURTS. The courts of appeals shall have jurisdiction of appeals from all final decisions of the *district courts of the United States,* . . .

"Sec. 1292 Tit. 28 USCA INTERLOCUTORY DECISIONS. (a) The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States, . . .

"Sec. 1294 Title 28 USCA CIRCUITS IN WHICH DECISIONS REVIEWABLE. Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows: (1) From a district court of the United States to the Court of Appeals for the circuit embracing the district; . . ."

Assuming, for the purposes of argument, that the United States Court of Appeals for the Ninth Circuit does not have appellate jurisdiction over cases presently arising in the courts of Alaska, the defendants' problem of no appeal could only be solved by the Legislature of Alaska. By a stroke of its pen, Alaska could end the state jurisdiction of the present territorial courts. The reason the Alaska Legislature must solve this problem is because there is no constitutional right to appeal. See *Tinkoff vs. United States,* 86 F. 2d 868 (7 Cir. 1937); *United States vs. St. Clair,* 42 F. 2d 26 (8 Cir. 1930); *Williams vs. United States,* 1 F. 2d 203 (8 Cir. 1924).

Counsel for the defendants have relied principally upon the case of *Coyle vs. Oklahoma,* 221 U. S. 559 (1910), which can easily be distinguished on the facts. In that case the legislature of Oklahoma authorized the moving of the state capital from Guthrie to Oklahoma City contrary to a provision of the Oklahoma Statehood Bill. The United States Supreme Court said this action was within a state's power after it was admitted to the Union. Likewise it is the Alaska Legislature's prerogative to abolish the present territorial courts' jurisdiction over state matters any time it sees fit.

For the reasons stated, the motion for a continuance is denied.

Dated at Anchorage, Alaska this 9th day of April, 1959.

/s/ J. L. McCarrey, Jr.
U. S. District Judge